No. 77-716

In the Supreme Court of the United States

OCTOBER TERM, 1977

MAX CLELAND, ADMINISTRATOR OF THE VETERANS ADMINISTRATION, ET AL., APPELLANTS

v.

NATIONAL COLLEGE OF BUSINESS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA

JURISDICTIONAL STATEMENT

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CITATIONS

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OPINION BELOW

The opinion of the district court (App. A, *infra*, pp. 1a–33a) is reported at 433 F. Supp. 605.

JURISDICTION

The judgment and order of the district court, declaring unconstitutional and enjoining the defendants from enforcing 38 U.S.C. 1673(d) as amended by Pub. L. 94–502, 90 Stat. 2387, and 1789(c), as amended by Pub. L. 94–502, 90 Stat. 2401, was entered on June 24, 1977 (App. B, *infra*, pp. 34a–35a). A notice of appeal to this Court was filed on July 22, 1977 (App. C, *infra*,

p. 36a). On September 19, 1977, Mr. Justice Blackmun extended the time for docketing the appeal to and including October 20, 1977, and on October 10, 1977, he further extended the time to and including November 19, 1977. Jurisdiction is conferred on this Court by 28 U.S.C. 1252.

QUESTION PRESENTED

Whether 38 U.S.C. 1673(d) and 1789(c), as amended, which provide, with some exceptions, that the Administrator of the Veterans Administration, in reviewing applications for educational benefits, shall not approve a veteran's enrollment in courses that have been in operation for less than two years or in which more than 85 percent of the enrolled students receive either federal tuition assistance or assistance from the school itself, are consistent with the Due Process Clause of the Fifth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of * * * property, without due process of law.

The relevant provisions of 38 U.S.C. (Supp. V) 1673(d), as amended by Section 205 of Pub. L. 94–502, 90 Stat. 2387, and of 38 U.S.C. (Supp. V) 1789, as amended by Section 509 of Pub. L. 94–502, 90 Stat. 2401, are set forth at App. D, *infra*, pp. 37a–39a.

STATEMENT

1. Pursuant to 38 U.S.C. (and Supp. V) 1651 *et seq.*, veterans and other individuals meeting prescribed

conditions can qualify for veterans' educational assistance benefits. The purposes of this educational program are to make service in the Armed Forces of the United States more attractive, to extend the benefits of higher education to qualified and deserving young persons who might not otherwise be able to afford such an education, and to restore educational opportunities and status which an individual may have lost because of his military service. 38 U.S.C. 1651.[1]

A veteran who wishes to initiate a program of education is required to file an application with the Administrator of the Veterans Administration. Before the Administrator approves such an application, he must determine whether the veteran is eligible for the assistance and, if so, whether his proposed program of education meets certain statutory requirements. 38 U.S.C. (Supp. V) 1671.[2]

Two of those provisions, commonly referred to as the 85–15 requirement and the two-year rule, are at issue here. The 85–15 requirement, which is imposed by 38 U.S.C. 1673(d), as amended, requires the Administrator to disapprove an application for benefits if an eligible veteran enrolls in any course[3] "for any period

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[1] Eligible veterans are entitled to varying amounts of educational assistance depending in part on the amount of time spent on active duty. 38 U.S.C. (and Supp. V) 1661. Each eligible veteran is permitted to select the educational program that he believes will best assist him in attaining an educational, professional, or vocational objective. 38 U.S.C. 1670.

[2] Receipt of educational benefits is conditioned on the veteran being enrolled in a course that has been approved by the Administrator or the appropriate state approving agency. 38 U.S.C. (Supp. V) 1683 and 1772.

[3] Exceptions are made for courses for the educationally disad-

during which the Administrator finds that more than 85 percentum of the students enrolled in the course are having all or part of their tuition, fees, or other charges paid to or for them by the educational institution, by the Veterans' Administration under this title and/or by grants from any Federal agency."[4] The 85–15 requirement does not prohibit the approval of further benefits to a veteran "already enrolled" in a particular course. 38 U.S.C. 1673(d), as amended. Moreover, the Administrator may waive the requirement if he determines that to do so would be in the interest of both the veteran and the federal government (*ibid.*).

The two-year rule is imposed by 38 U.S.C. 1789, as amended by Pub. L. 94–502.[5] It requires the Administrator to disapprove the enrollment of an eligible veteran in any course that has been offered for less than two years. As a general matter, this rule does not apply

vantaged, farm cooperative training courses, and certain courses offered by an educational institution under a contract with the Department of Defense. See 38 U.S.C. (and Supp. V) 1690 *et seq.* and 1789(b)(6), as amended.

[4] The statute was amended, immediately before this litigation began, by Section 205 of Pub. L. 94–502. Prior to the amendment, the 85–15 requirement applied only to courses offered by proprietary educational institutions that did not lead to a standard college degree, and students receiving nonveterans' federal educational benefits were not included in the 85 percent quota. The forerunner of the present 85–15 requirement was enacted in 1952 and applied only to non-accredited courses below the college level offered by proprietary institutions. See Pub. L. 82–550, 66 Stat. 667.

[5] Prior to the enactment of Pub. L. 94–502, the two-year rule was applied somewhat less broadly. Pub. L. 94–502 extended the two-year rule to public or tax supported schools outside the taxing jurisdiction and to branches and extensions of proprietary educational institutions beyond normal commuting distance from the main institution. The forerunner of this type of provision was included in Pub. L. 82–550, 66 Stat. 667.

to courses offered in a public or other tax-supported educational institution within the area of the taxing jurisdiction; to courses offered by an educational institution that has been in operation for at least two years, if they are similar in character to instruction previously given; to courses offered by a nonprofit college which are recognized for credit toward a standard college degree; and to certain other courses. 38 U.S.C. 1789(b) and (c)(1), as amended. Notwithstanding these exceptions, however, the two-year rule does apply to courses offered at branches and extensions of proprietary educational institutions located beyond the normal commuting distance of the institution. 38 U.S.C. 1789(c)(2), as amended.

2. Appellee National College of Business, a proprietary educational institution, and four veterans eligible for veterans' educational benefits instituted this action in the United States District Court for the District of South Dakota, challenging the constitutionality of both the 85–15 requirement and the two-year rule.[6] The court held that none of the individual plaintiffs had standing (App. A, *infra,* pp. 12a–15a). The court determined, however, that appellee has a significant financial investment in veterans' educational programs and would suffer "direct and immediate economic injury" from application of either the 85–15 requirement or the

[6] Although the plaintiffs also challenged 38 U.S.C. 1724, as amended by Section 307 of Pub. L. 94–502, 90 Stat. 2390, which pertains to the discontinuance of educational assistance allowances, the district court did not rule on the constitutionality of that provision because it concluded that none of the plaintiffs had standing to challenge it (App. A, *infra,* pp. 12a–15a, 16a). Accordingly, the constitutionality of that provision is not now at issue before this Court.

two-year rule (App. A, *infra,* pp. 15a–16a). The court acknowledged that there was a rational basis for both the 85–15 requirement and the two-year rule, which were designed "to reduce fraudulent and wasteful expenditures of money on bogus courses * * *" (App. A, *infra,* pp. 24a–25a, 31a). The court nevertheless concluded that more than a rational basis was necessary to support their constitutionality, *i.e.,* that a " 'middle tier' approach" was required (App. A, *infra,* pp. 28a, 30a):

> The case now before the Court is one where the interest at stake [*i.e.,* veterans' educational benefits] "approaches fundamental and personal rights." * * * The scrutiny required when such interests are at stake may not be the strictest but it is much more than the minimum.

Applying such a "middle tier" standard, the court held the statutes unconstitutional (App. A, *infra,* p. 31a):

> The challenged legislation could indeed eliminate bogus courses, but in the process, courses, and perhaps institutions, which especially serve veterans will be eliminated also. The challenged statutes are an example of legislative overkill. Fraud and waste are eliminated at the cost of eliminating quality educational opportunities for veterans.[7]

[7] The court further observed (App. A, *infra,* p. 31a):

> We are cognizant of the fact that social legislation in the past has not been subjected to as critical a level of scrutiny as that which we have herein applied. *See Dandridge v. Williams,* 397 U.S. 471, * * *. If the level of judicial scrutiny applied in cases such as *Dandridge v. Williams* is the law for this case, then the decision should be different.

THE QUESTION IS SUBSTANTIAL

This appeal presents an important question regarding the constitutional validity of statutes designed to minimize the risk that veterans' educational benefits will be wasted on programs of little value.[8] The district court acknowledged that these statutory provisions, which generally restrict the availability of veterans' educational assistance to established courses that have attracted a substantial proportion of non-subsidized students, are reasonably related to the legitimate purpose of "prevent[ing] charlatans from grabbing the veteran's education money" (App. A, *infra,* p. 22a). The court's conclusion that these provisions nevertheless are unconstitutional simply rests upon a plain misunderstanding of the requirements of the Due Process Clause.[9]

1. This Court frequently has reiterated that social welfare classifications satisfy the requirements of due process if they have a rational basis. See, *e.g., Weinberger* v. *Salfi,* 422 U.S. 749, 770; *Richardson* v. *Bel-*

[8] In 1976, there were an estimated 1,294,267 veterans enrolled in institutions of higher learning. S. Rep. No. 94–1243, 94th Cong., 2d Sess. 89 (1976).

[9] Other courts have upheld the provisions challenged here. See *Rolle* v. *Cleland,* 435 F. Supp. 260 (D. R.I.), appeal pending, C.A. 1, No. 77–1422; *Fielder* v. *Cleland,* 433 F. Supp. 115 (E.D. Mich.), appeal pending, C.A. 6, No. 77–1478; *Hunter* v. *Cleland,* N.D. Ala., No. C.A. 77–P–0433–NE, decided November 7, 1977. See also *Dodd* v. *Rott,* E.D. Wisc., No. 77–C–142, decided September 7, 1977.

cher, 404 U.S. 78, 81; *Dandridge* v. *Williams,* 397 U.S. 471, 487. Thus the Court summarized last Term in *Mathews* v. *DeCastro,* 429 U.S. 181, 185:

> The basic principle that must govern an assessment of any constitutional challenge to a law providing for governmental payments of monetary benefits is well established. Governmental decisions to spend money to improve the general public welfare in one way and not another are "not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." *Helvering* v. *Davis,* 301 U.S. 619, 640. In enacting legislation of this kind a government does not deny equal protection "merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' " *Dandridge* v. *Williams,* 397 U.S. 471, 485.

The district court in this case, however, refused to apply the "rational basis" test, because in the court's view the importance of the educational benefits at issue called for the somewhat stricter scrutiny that the court believed this Court applies in cases involving classifications based upon gender or legitimacy. The district court committed several errors in this chain of reasoning. First, the court's implicit premise that the 85–15 requirement and the two-year rule will operate to deprive veterans of educational benefits to which they

otherwise would be entitled was erroneous: these statutory provisions simply channel the veterans' educational efforts toward courses that are likely to be more worthwhile, without depriving veterans of assistance. Second, the "rational basis" test would apply even if veterans' entitlements to educational benefits genuinely were at stake: "the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing * * * social and economic legislation." *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 35. Third, whatever the appropriate standard of review may be in cases involving classifications based upon gender or legitimacy (see *e.g., Craig* v. *Boren,* 429 U.S. 190, 212–213 (concurring opinion of Mr. Justice Stevens); *Trimble* v. *Gordon,* 430 U.S. 762, 767), the "rational basis" test propounded in *Dandridge* v. *Williams* and other similar cases not involving classifications based upon the accident of birth remains "the constitutional test * * * applied in cases like this." *Califano* v. *Jobst,* No. 76–860, decided November 8, 1977 (slip op. 7).

For the reasons discussed below (pp. 10–15, *infra*), the district court correctly determined that the classifications challenged are rational. The court acknowledged that its decision with regard to constitutionality turned upon its choice of a stricter standard of review, stating that "[i]f the level of judicial scrutiny applied in cases such as *Dandridge* v. *Williams* is the law for this case, then the decision should be different" (App. A, *infra,* p. 31a). The court's rejection of the applicability of the "rational basis" test was so clearly erroneous that, in light of the court's determination that

the statutes have a rational basis, summary reversal appears warranted.

2. The 85–15 requirement and the two-year rule are rationally based.

a. The current provisions establishing the 85–15 requirement and the two-year rule are the products of a series of legislative decisions strengthening the safeguards against abuses of the program of veterans' educational benefits.[10] The forerunner of the current 85–15 requirement was enacted when Congress extended educational benefits to veterans of the Korean conflict. The House Select Committee to Investigate Educational Training and Loan Guarantee Programs under the GI Bill, which conducted an investigation into abuses of the World War II GI Bill, had recommended the enactment of a provision limiting educational benefits to courses offered by public schools and colleges and to courses offered by private schools that had been in

[10] Legislation which would further amend these provisions is now pending. Section 305(a)(1)(A) and (B) of H.R. 8701, 95th Cong., 1st Sess., the GI Bill Improvement Act of 1977, would authorize the Administrator to waive the two-year rule if he determines waiver to be in the best interests of the veteran and the federal government. Section 305(a)(2) of the bill provides that the 85–15 requirement generally would be inapplicable to courses offered by an institution where no more than 35 percent of the students receive veterans' educational benefits. Pending completion of further studies, Section 305(a)(3) would exclude from the 85 percent ceiling nonveteran students who receive other federal educational benefits.

On November 3, 1977, the House passed H.R. 8701 with amendments (123 Cong. Rec. H12139–H12161 (daily ed., November 3, 1977)), and on November 4, 1977, the Senate agreed to the bill as amended (123 Cong. Rec. S18812–S18821 (daily ed., November 4, 1977)), thus clearing the measure for presentation to the President. The President has not yet approved H.R. 8701, which was submitted to him as an enrolled bill on November 15, 1977. We will inform the Court promptly of the President's action.

successful operation for at least one year and had maintained an enrollment of at least 25 percent nonveteran students. See S. Rep. No. 94–1243, 94th Cong., 2d Sess. 88 (1976). In response to this recommendation, Congress enacted the first version of the 85–15 requirement, which applied only to nonaccredited courses below the college level offered by proprietary institutions. Pub. L. 82–550, 66 Stat. 667. This requirement, that a course be found worthwhile by a substantial number of students not subsidized by the federal government before the Administrator authorizes payment of veterans' educational benefits for the course, was intended as "a way of protecting veterans by allowing the free market mechanism to operate" (S. Rep. No. 94–1243, *supra,* at 88).[11]

A review of this provision during consideration of the 1974 GI Bill amendments led to the extension of the 85–15 requirement to courses offered by accredited

[11] The considerations underlying imposition of the 85–15 requirement have been summarized as follows (S. Rep. No. 94–1243, *supra,* at 88):

> • • • Congress was concerned about schools which developed courses specifically designed for those veterans with available Federal moneys to purchase such courses • • •. The ready availability of these funds obviously served as a strong incentive to some schools to enroll eligible veterans. The requirement of a minimum enrollment of students not wholly or partially subsidized by the Veterans' Administration was a way of protecting veterans by allowing the free market mechanism to operate.
>
> The price of the course was also required to respond to the general demands of the open market as well as to those with available Federal moneys to spend. A minimal number of nonveterans were required to find the course worthwhile and valuable or the payment of Federal funds to veterans who enrolled would not be authorized.

proprietary institutions that do not lead to a standard college degree. Section 203(3) of Pub. L. 93–508, 88 Stat. 1582. Finally, in response to the Veterans Administration's finding of "increased recruiting * * * directed exclusively at veterans" (S. Rep. No. 94–1243, *supra,* at 89), Congress in 1976 extended the 85–15 requirement to courses leading to a standard college degree as well. The Senate Veterans' Affairs Committee recommended approval of the amendment, noting its agreement with the view stated by the Veterans Administration that " 'if an institution of higher learning cannot attract sufficient nonveteran and nonsubsidized students to its programs, it presents a great potential for abuse of our GI educational programs.' " *Ibid.*"

The 1976 amendment altered the method of computing the 85–15 requirement, to include for the first time students receiving federal grants from agencies other than the Veterans Administration within the 85 percent ceiling. The Senate Committee reasoned that including all direct federal grants that need not be repaid was consistent with the general purpose of the 85–15 requirement (*id.* at 89–90).[12] At the same time, Congress recognized the desirability of coupling this expansion of the 85–15 requirement with a provision per-

[12] The Committee emphasized that such an extension of the 85–15 requirement would not be "onerous," because veterans no longer comprise a major portion of the students attending institutions of higher learning. S. Rep. No. 94–1243, *supra,* at 89. In 1947, 46.7 percent of students attending institutions of higher learning were receiving veterans' benefits; in 1976, only 11.5 percent of such students were receiving veterans' benefits. *Ibid.*

[13] The Senate Committee noted that only about 14 percent of students enrolled at institutions of higher learning received such grants. S. Rep. No. 94–1243, *supra,* at 89.

mitting administrative flexibility (*id.* at 90), and it accordingly permitted the Administrator to waive that requirement when he finds it "to be in the interest of the eligible veteran and the Federal Government." 38 U.S.C. 1673(d), as amended."

b. The forerunner of the current two-year rule, Pub. L. 81–266, 63 Stat. 653, also was enacted based upon experience with administration of the World War II GI Bill. That statute prohibited payments to institutions that had been in operation for less than one year. Like the 85–15 requirement, this provision was intended to protect veterans by allowing "the free market mechanism to operate and weed out those institutions who could survive only by the heavy influx of Federal payments." S. Rep. No. 94–1243, *supra,* at 128.

Public and other tax-supported schools were exempted from this rule by Pub. L. 81–610, 64 Stat. 337, which reflected Congress' belief that the abuses this restriction was intended to curb had in most cases involved only private institutions. S. Rep. No. 94–1243, *supra,* at 128. Section 227 of the Korean Conflict GI Bill, Pub. L. 82–550, 66 Stat. 667, extended the requirement to two years. In reporting favorably on this measure, the House Veterans' Affairs Committee noted that it provided "a real safeguard to assure sound training for the veteran, at reasonable cost, by seasoned institutions." H.R. Rep. No. 1943, 82d Cong., 2d Sess. 30 (1952).

[14] The 1976 amendment exempted farm cooperative training programs from the 85–15 requirement in reliance on advice from the Veterans Administration that such programs are primarily designed by state and local education and agriculture officials to serve veterans. S. Rep. No. 94–1243, *supra,* at 90.

In 1976, the two-year rule was made applicable to branches of private institutions located beyond normal commuting distance from the main campus and to branches of public or tax supported schools located outside the taxing jurisdiction. This provision was enacted in response to problems arising in connection with the "spectacular" increase in veterans' enrollment in schools establishing multibranch campuses. S. Rep. No. 94–1243, *supra,* at 129. The Senate Veterans' Affairs Committee reported (*ibid.*):

> Certain institutions, both public and proprietary, have suddenly developed many branch campuses throughout the United States. For the most part, these schools also have entered into extensive recruiting contracts directed almost exclusively at veterans. The Veterans' Administration, in a favorable report to the amendments proposed by this section, stated that:
>
> In recent months, a number of instances have been brought to our attention which represent abuse of our educational programs. Some of these cases involved contracting between nonprofit schools and profit schools or organizations whereby courses designed by the latter are offered by the non-profit, accredited school on a semester- or quarter-hour basis. In others, there are arrangements between nonprofit, accredited schools and outside profit firms whereby the latter, for a percentage of the tuition payment, perform recruiting services primarily for the establishing of these

> branch locations for the school. These recruiting efforts are aimed almost exclusively at veterans.

The Committee found that this situation created great potential for abuse, and it recommended enactment of the narrowing amendment.

c. As the foregoing demonstrates, the history of both the two-year rule and the 85–15 requirement amply supports the conclusion that they are reasonably related to the prevention of wasteful expenditures of veterans' educational benefits. Due process requires nothing more. See pp. 7–10, *supra.* As this Court stated in *Weinberger* v. *Salfi, supra,* 422 U.S. at 777:

> The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule.[15]

[15] Moreover, Congress could properly enact safeguards to combat the particular abuses it had detected in the administration of the veterans' educational benefits programs even though similar restrictions had not been applied to the payment of other federal educational benefits. This Court often has recognized that Congress may deal with a problem "one step at a time," by selecting "one phase of one field and apply[ing] a remedy there, neglecting the others." *Jefferson* v. *Hackney,* 406 U.S. 535, 546; *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 489. Veterans' benefits account for more than half of all federal expenditures for post secondary education. See Statement of the Administrator of Veterans' Affairs

CONCLUSION

Probable jurisdiction should be noted.[16]

Respectfully submitted.

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NOVEMBER 1977.

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before the Subcommittee on Postsecondary Education, House Committee on Education and Labor, 95th Cong., 1st Sess., p. 2 (June 16, 1977). The Due Process Clause does not require Congress to ignore the abuses detected in a program of this magnitude until it is prepared to legislate regarding abuses, not yet detected, in other similar programs.

[16] In the alternative, the Court may consider summary reversal to be appropriate. See pp. 9–10, *supra*.

APPENDIX A

Johnnie L. FRANCIS, Robert L. Martin, John L. Hughley, Cornell L. Conroy, and the National College of Business

v.

Max CLELAND, Administrator, Veterans Administration, A. H. Thornton, Director, Veterans Administration Center.

No. Civ 76-5085.

United States District Court,
D. South Dakota.

June 25, 1977.

MEMORANDUM OPINION

BOGUE, District Judge.

I.

This action was commenced by four armed forces veterans and an educational institution which enrolls veterans. Plaintiffs' theory is simply that the challenged sections of the Veterans' Education and Employment Act of 1976 conflict with the federal Constitution; hence, they ought be declared null and void and defendants ought be enjoined from enforcing them.

II.

Plaintiffs filed their complaint asking for injunctive relief on December 31, 1976. On December 31, 1976,

this Court entered a temporary restraining order enjoining defendants from enforcing the challenged sections as they applied to these plaintiffs. A hearing on the application for a preliminary injunction was set for January 17, 1977. At said hearing plaintiffs came forward with evidentiary matter (some witnesses and many exhibits) by which they tried to establish the prerequisites for continuing injunctive relief. Plaintiffs at that hearing asked for additional time to present evidence. Defendants argued vigorously that the taking of any evidence was of no possible benefit as the only thing then before the Court was a legal question; namely, whether or not the challenged pieces of legislation were rationally related to some legitimate governmental objective. Their point was well taken insofar as their motion to dismiss raised a purely legal question. However, as to whether or not continued injunctive relief was proper, this Court determined that it would be most fair to everyone to continue the hearing until the earliest convenient moment at which time each party would have opportunity to put in whatever evidence seemed material and relevant. The restraining order was left in effect pending further order of the Court and February 7, 1977, was set for the next hearing date.

On February 7, 1977, plaintiffs put in some evidence and defendants put on one witness. This Court then denied defendants' motion to dismiss. Defendants had moved earlier to consolidate the hearing on the application for preliminary injunctive relief with the hearing on the merits; and there being no opposition to

such consolidation motion, defendants' motion was granted.

Subsequently, plaintiffs moved for leave to file an amended complaint stating that they wanted to amend to conform to the evidence submitted. Leave was granted. An amended complaint was thereupon filed. Plaintiffs also filed a motion to reopen which this Court denied. Defendants moved to dismiss the amended complaint and also moved in the alternative for summary judgment. Briefs are all in, and the case is in a posture for final disposition on the merits.

III.

[1] Plaintiffs allege that jurisdiction exists under 28 U.S.C. § 1331 and under 28 U.S.C. § 1361. It appears from the briefs that defendants are not making an issue of jurisdiction. We think plaintiffs' reliance upon 28 U.S.C. § 1331 is well-placed, and proceed on the theory that a federal question has been presented.

Although plaintiffs allege damages in excess of $10,000.00, we make no finding as to the monetary amount in dispute. We deem it sufficient to note that 28 U.S.C. § 1331(a) as amended by Public Law 94–574, section 2, provides that no jurisdictional amount is necessary in any action predicated on § 1331 and brought "against the United States, any agency thereof, or any officer or employee thereof in his official capacity."

IV.

This lawsuit presents a challenge to three specific

provisions of the Veterans Education and Employment Act of 1976. These are:

(A) Section 205(d) of Public Law 94–502 which amends 38 U.S.C. § 1673(d);

(B) Section 509(b) of Public Law 94–502 which amends 38 U.S.C. § 1789; and

(C) Section 307 of Public Law 94–502 as it amends 38 U.S.C. § 1724.

The changes made by each of these amendments will be outlined separately.

A. Title 38 U.S.C. § 1673(d) embodies what is commonly known as the 85–15 rule. The Administrator is directed to disapprove a veteran's enrollment in any course for which he is not already enrolled if more than 85 percent of the students enrolled in that course are subsidized in whole or in part by the federal government or the educational institution itself. Disapproval would mean, of course, that G.I. Educational Benefits would not be paid unless the veteran found some approved courses. Thus the 85–15 rule is an attempt to force upon courses a market test; *i.e.* the theory behind the legislation is that if a course can attract a certain percent of paying students, then it is probably less likely to be a gimmick to attract veterans' dollars and more likely to be a quality course.

Prior to the amendment of 1976, 38 U.S.C. § 1673(d) read in relevant part as follows:

> (d) The Administrator shall not approve the enrollment of any eligible veteran, not already enrolled, in any course which does not lead to a standard college degree and which is offered by a proprietary profit or proprietary nonprofit educational institution for any period during which the Administrator finds that more than 85 per centum of the students enrolled in the course are having all or part of their tuition, fees, or other charges paid to or for them by the educational institution or the Veterans' Administration under this title.

Subsequent to the amendment of 1976, § 1673(d) reads in relevant part:

> The Administrator shall not approve the enrollment of any eligible veteran, not already enrolled, in any course . . . for any period during which the Administrator finds that more than 85 per centum of the students enrolled in the course are having all or part of their tuition, fees, or other charges paid to or for them by the educational institution, by the Veterans' Administration under this title and/or by grants from any Federal agency.

The significance of this 1976 amendment to § 1673 is twofold:

(1) the section is extended to cover courses not previously covered, and

(2) the allowable composition of the 85 percent group (which may be subsidized in one form or another) is altered.

Prior to the 1976 amendment the 85–15 rule pertained to courses offered by proprietary profit and proprietary nonprofit educational institutions if the courses led to something less than a standard college degree. The latest amendment extends the 85–15 rule to courses offered by public, tax-supported schools as well as to courses of other institutions not supported by taxes even if the courses, at either type of school, lead

to a standard college degree. In effect, § 205(d) of P.L. 94–502 extends the 85–15 rule to courses offered by all institutions of higher learning, the rest of the "educational universe." (Wolowitz, T273)

The second change in § 1673 is more significant for the present lawsuit. Under the law before the 1976 amendment the computation of 85 percent of the students, which could permissibly be subsidized in any course, was done without reference to students receiving federal grants other than veterans' benefits. As of December 1, 1976, the 85 percent must be computed differently. Students receiving aid from any federal agency or from the school itself are all thrown over into the potential 85 percent category; hence, at least 15 percent of the students enrolled in a course must be financed by their own resources, parents or some source other than the educational institution or the federal government.

B. Title 38 U.S.C. § 1789 embodies what is commonly referred to as the two-year rule. The two-year rule means basically that the Administrator is required to disapprove a veteran's enrollment in courses (hence his benefits) if the course has not yet been offered for two years. Some exceptions are allowed. The theory is the same as that underlying the 85–15 rule; namely, to force a course to survive a market test before G.I. Bill dollars start supporting it.

Prior to the amendment of 1976, 38 U.S.C. § 1789 stated as follows:

> § 1789. Period of Operation for approval. (a) The Administrator shall not approve the enrollment of an eligible veteran or eligible person in any course

> offered by an educational institution when such course has been in operation for less than two years.
> (b) Subsection (a) shall not apply to—(1) any course to be pursued in a public or other tax-supported educational institution;
> (2) any course which is offered by an educational institution which has been in operation for more than two years, if such course is similar in character to the instruction previously given by such institution;
> (3) any course which has been offered by an institution for a period of more than two years, notwithstanding the institution has moved to another location within the same general locality, or has made a complete move with substantially the same faculty, curricula, and students, without change in ownership;
> (4) any course which is offered by a non-profit educational institution of college level and which is recognized for credit toward a standard college degree; or
> (5) any course offered by a proprietary nonprofit educational institution which qualifies to carry out an approved program of education under the provisions of subchapter V or VI of chapter 34 of this title (including those courses offered at other than the institution's principal location) [38 USCS §§ 1690–1693 or 1695–1697A] if the institution offering such course has been in operation for more than two years. (Oct. 24, 1972, P.L. 92–540, Title III § 316(2), 86 Stat. 1087.)

Subsection (a) set out a general rule, and subsection (b) provided several exceptions to the rule.

The new law cuts back on exceptions by qualifying subsection (b). Subsection (b) is qualified by a new subsection (subsection (c)) which states:

> Notwithstanding the provisions of subsection (b) (1), (2), (3), or (4) of this section, the provisions of subsection (a) shall apply to any course offered by a branch or extension of—
>
> (1) a public or other tax-supported institution where the branch or extension is located outside of the area of the taxing jurisdiction providing support to such institution; or
>
> (2) a proprietary profit or proprietary nonprofit educational institution where the branch or extension is located beyond the normal commuting distance of such institution.

This legislation extends the two-year rule to courses not heretofore covered, *i.e.* certain courses offered by public tax-supported institutions and certain courses offered by private schools even though the courses are recognized for credit toward a standard college degree. Public schools may offer courses in branches or extensions anywhere within their taxing jurisdiction without having veterans who enroll in them be subject to the two-year rule. Other schools can branch out within commuting distance (25 or 30 miles according to testimony) without triggering the two-year rule for veterans who enroll in courses offered at such a branch or extension.

C. Title 38 U.S.C. § 1724 is aimed at an objective different from that underlying the 85–15 and two-year rules. While the latter two rules attempt to insure quality courses, § 1724 attempts to insure that the enrolled veteran actually does something constructive while he is in school. Section 1724 attempts to insure that each veteran, instead of merely enjoying the academic environment, makes definite progress toward an educational goal.

Prior to the 1976 amendment, 38 U.S.C. § 1724 read as follows:

> The Administrator shall discontinue the educational assistance allowance on behalf of an eligible person if, at any time, the Administrator finds that according to the regularly prescribed standards and practices of the educational institution he is attending, his conduct or progress is unsatisfactory.
>
> The Administrator may renew the payment of the educational assistance allowance only if the Administrator finds that—
>
> (1) the cause of the unsatisfactory conduct or progress of the eligible person has been removed; and
>
> (2) the program which the eligible person now proposes to pursue (whether the same or revised) is suitable to the person's aptitudes, interests, and abilities.

One qualifying sentence has now been added and it states:

> Unless the administrator finds there are mitigating circumstances, progress will be considered unsatisfactory at any time an eligible person is not progressing at a rate that will permit such person to graduate

within the approved length of the course based on the training time as certified to the Veterans' Administration.

In essence, the Congress set out to define "unsatisfactory progress." In doing so, time limits will be set insofar as a course of study will have an approved length; deviation will be regarded as dereliction and benefits will be withdrawn.

V.

As stated earlier, each of the three enumerated sections of the Veterans' Education and Employment Act of 1976 is challenged on the theory that each conflicts with one or more of the amendments to the United States Constitution. Preliminary to an in-depth analysis of such claim, it is essential to resolve the issue of which of these plaintiffs, if any, has brought a concrete case or controversy rather than an abstract question of law to this Court, *i. e.* who, if anyone, is so situated that he has standing to make these challenges.

VI.

[2] The standing issue necessitates two separate levels of inquiry; indeed, as the United States Supreme Court has recently observed when a standing issue was raised:

> [T]wo distinct standing questions are presented. . . . and they are these: *first*, whether the plaintiff-appellees allege "injury in fact," that is, a sufficiently concrete interest in the outcome of their suit to make it a case or controversy subject to a federal court's Art. III jurisdiction, and *second*, whether as

> a prudential matter, the plaintiff-appellees are proper proponents of the particular legal rights on which they base their suit. (Emphasis added.) *Singleton v. Wulff*, 428 U.S. 106, 112, 96 S.Ct. 2868, 2873, 49 L.Ed.2d 826 (1976) *citing Data Processing Service v. Camp*, 397 U.S. 150, at 152–153, 90 S.Ct. 827, at 829, 25 L.Ed.2d 184 (1979); *Flast v. Cohen*, 392 U.S. 83, 99, 88 S.Ct. 1942, 1952, 20 L.Ed.2d 947 (1968); and *Barrows v. Jackson*, 346 U.S. 249, 255, 73 S.Ct. 1031, 1034, 97 L.Ed. 1586 (1953) wherein the two separate criteria for standing are distinguished.

The issue of standing having been contested by defendants, we deem it proper at this point not only to examine plaintiffs' allegations, but also to determine as matters of fact whether plaintiffs meet the standing requirements set out in *Singleton v. Wulff*.

[3, 4] A. The requirement of injury in fact is based on the Art. III requirement of a case or controversy; *Data Service Processing v. Camp, supra.* Without injury in fact there can be no case or controversy in the constitutional sense. The injury need not necessarily be economic. *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973) (hereinafter SCRAP). Neither the degree of harm nor the significance of the grievance are required to be quantitatively measured when a court examines the first element of the standing test. *SCRAP*, 93 S.Ct. at 2417, n.14. Nevertheless, a plaintiff must allege and, if the point is controverted, must prove that some con-

crete injury has either been inflicted upon him or will immediately be inflicted upon him if the Court does not protect him.

[5] 1. Plaintiff Johnnie Francis, after his discharge from the United States army, tried several business ventures which failed. Mr. Francis was advised that his business prospects would be improved if he obtained some business training, so with that purpose in mind he enrolled at the National College of Business (hereinafter N.C.B.). He studied for six quarters and drew G.I. educational benefits during that time.

At the time of Mr. Francis' testimony in court, he was not enrolled, but had reapplied. He had no idea whether he had been accepted or not, but was definitely operating on the assumption that the 85–15 rule was somehow a barrier to the continuation of his business education. Plaintiffs produced no evidence, however, to show that Johnnie Francis' enrollment in any particular course would be disapproved by the Administrator on the basis of the 85–15 rule or the two-year rule.

The effect of the new law has not been linked to the situation of Johnnie Francis. He has some vague apprehensions, but no injury in fact. To assert that injury to him would likely occur would be, on this record, pure conjecture. We must conclude, therefore, that Johnnie Francis has not presented a concrete case or controversy and has no standing to challenge 85–15 or the two-year rule. Not being enrolled, he is assuredly in no position to challenge 38 U.S.C. § 1724, the progress requirement.

[6] 2. Plaintiff Cornell L. Conroy is presently enrolled at N.C.B. and is drawing G.I. educational benefits. The modified 85–15 rule and the modified two-year rule do not apply to a course in which a veteran is already enrolled. At present Mr. Conroy is even more removed from injury in fact traceable to these rules than is Johnnie Francis. We must hold therefore that Cornell Conroy has no standing to challenge either 85–15 or the two-year rule.

With respect to 38 U.S.C. § 1724, however, his position must be viewed differently. That section could rightfully be challenged, not by someone hoping to enter a course of study, but rather by someone hoping to remain in a course of study when his progress was judged unsatisfactory. If there were evidence tending to show that Mr. Conroy was not progressing toward his goal within the time limits approved by the Administrator, then he would be an ideal plaintiff to challenge 38 U.S.C. § 1724.

As the record stands now, we have no evidence that Mr. Conroy is progressing less rapidly than N.C.B. or the Veterans Administration thinks he ought. We have no evidence whatever that his benefits might be terminated for failure to progress rapidly enough; hence, as to 38 U.S.C. § 1724 we must also conclude that Mr. Conroy has no standing to sue because he has neither alleged nor proved injury in fact.

[7] 3. Plaintiff Robert L. Martin is on active duty in the United States Air Force. He was enrolled part-time at N.C.B. in 1976; he dropped out sometime in September and has not applied for re-enrollment at any N.C.B. branch.

Presently, this plaintiff is seeking an early separa-

tion (he still has approximately twenty-two months active duty) and hopes to return to his home in Baldwin City, Kansas, where he would be able to attend the Shawnee Mission branch of N.C.B. Because the Shawnee Mission extension, at the time of the hearing, had not yet been in operation for two years, the contemplated move could put Mr. Martin into a position in which he would be out of the Air Force but would not be able to get G.I. educational benefits for attendance at Shawnee. We have no evidence that the early separation will occur, however, and Mr. Martin has not even made inquiries as to whether he could be admitted to the Shawnee Mission branch of N.C.B.

A concrete case or controversy concerning 85–15 and the two-year rule is lacking and standing to challenge those sections must be denied. For the reasons discussed in Mr. Francis' case, this plaintiff has no standing to challenge 38 U.S.C. § 1724.

[8] 4. Plaintiff John L. Hughley did not testify at the hearing; accordingly, his position must be sketched from the uncontroverted assertions of his affidavit. He enrolled at N.C.B. in 1975, it is implied in the affidavit that he is still enrolled there, and he expresses grave concern about his future if his educational benefits are cut off.

As with Cornell Conroy, some change in his situation would have to occur before the 85–15 rule or the two-year rule would pose any threat to his benefits. Having no evidence that such a change is imminent, we can only conclude that plaintiff Hughley has alleged no injury in fact and consequently has no standing to challenge the 85–15 rule or the two-year rule. For the

reasons stated in our discussion of Mr. Conroy's situation, we likewise conclude at this point that John L. Hughley has no standing to challenge 38 U.S.C. § 1724.

[9] 5. N.C.B. is a nonprofit South Dakota corporation engaged in the business of higher education. John W. Hauer, president of N.C.B., testified at length about the programs offered by N.C.B., the investments made for the education of veterans and the immediate injury that would occur if the temporary restraining order were lifted. According to his testimony, investments in programs designed for the education of veterans is substantial; at least $680,000 has been invested in programs specifically designed to meet the needs of veterans. Veterans' responses have been good; consequently, the night school program in Rapid City and the courses at most of the branches are filled mostly by veterans.

Mr. Hauer testified that the situation of N.C.B. was such that application of the 85–15 rule would immediately put in jeopardy each and every program run by the school with two possible exceptions: the day school program in Rapid City and the program offered at a branch in Phoenix, Arizona.

His testimony relating to the effect of the two-year rule was similar to his testimony about the 85–15 rule. Because seven of N.C.B.'s thirteen extensions were, at the time of the hearing, less than two years old, it is plain that courses offered at these branches could not be approved for veterans. It was admitted, of course, that the extensions are all beyond commuting distance from the main campus in Rapid City.

From the record this Court finds with reference to

N.C.B.: this educational institution has a great financial investment in the education of the veterans and, if 85–15 and the two-year rule, or either, is applied to N.C.B., direct and immediate economic injury will occur. We conclude on the basis of these findings that the first half of the standing test has been passed by N.C.B. Insofar as N.C.B. seeks to challenge 85–15 and the two-year rule.

N.C.B. has, however, produced on the record no evidence of any injury caused by or likely to be caused by the application of 38 U.S.C. § 1724. In regard to that section, the first requirement for standing is missing and standing to press that claim will, accordingly, be denied.

B. Having found injury in fact in regard to N.C.B., a more difficult issue must be confronted; namely, whether N.C.B. is the proper proponent of the particular legal rights upon which the suit is based. The lawsuit is based upon several legal rights among which are: (1) the right to due process of law, (2) the right to equal protection of the law,[1] (3) the freedom (right) of association, (4) the right to travel, and (5) the right of privacy. Plaintiff N.C.B. also claims that the challenged legislation is: (6) an unlawful delegation of power, and (7) that it allows unlawful federal control of a private educational institution.

With the possible exception of the last claim, *supra*, these asserted rights are not asserted to be rights of N.C.B. which are being violated by the new veterans'

[1] Plaintiff's eighth claim for relief in their Amended Complaint appears to rest on the same legal theory as their second claim for relief, that is, the theory that equal protection principles are violated.

bill. In the well-pleaded amended complaint, plaintiffs plainly assert that the rights being violated are veterans' rights, not the rights of the institutional plaintiff. We are faced then with a peculiar dilemma: the rights asserted are those of veterans, but the only imminent injury we have found at this point is the threat of financial ruin for N.C.B. The question, therefore, is whether or not N.C.B., as an institution which provides services to veterans, can couple its potential injury with the veterans' constitutional rights and thereby become a proper proponent of the legal rights upon which the lawsuit is based. This Court has concluded that N.C.B. can properly link its injury with the students' rights and thereby gain standing in federal court.

[10] The key is the *jus tertii* concept which has recently been applied in *Craig v. Boren,* 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) and was explained in greater detail in *Singleton v. Wulff, supra.* It is a general rule that federal courts will not resolve controversies on the basis of the rights of third persons not parties to the lawsuit. *Barrows v. Jackson,* 346 U.S. at 259, 73 S.Ct. at 1036 (1953). The rule, however, has an exception.

[11] A litigant will be allowed to invoke the *jus tertii* doctrine, allowing him standing on the basis of the third person's rights, when two specific factual determinations are made. First, it must be determined that the litigant's activity is so bound up with the right of the third person that the litigant will be directly affected by the outcome of the suit, and is so situated as to become fully, or nearly, as effective an advocate

as the person whose rights are asserted. Thus the nature of the relationship is crucial. *Singleton v. Wulff, supra.* Second, there must exist a genuine obstacle that prevents the third party from being the most effective proponent of his own rights. In this situation that party in court becomes, as by default, the best advocate. *Singleton v. Wulff, supra.*

The case before the Court presents a situation to which the *jus tertii* concept is applicable. The relationship between N.C.B. and veterans is definitely such that the litigants' activities (education) are inextricably bound up with the veterans' rights. N.C.B. is in a position to be a very effective advocate for veterans' rights. Moreover, there is definitely an obstacle that prevents veterans from effectively asserting their rights. In *Singleton v. Wulff* the Supreme Court recognized "imminent mootness" as an obstacle. In this suit, there is the obstacle posed by the converse of the mootness doctrine, *i. e.* ripeness. A student would not have a ripe controversy unless a course were disapproved. If he commenced a lawsuit at that point, the educational opportunity would no doubt be gone by the time a final decision was made. Thus, as a practical matter, a veteran who actually needs the V. A. funds for school at a special point in time has little chance of challenging any legislation.

This Court concludes, therefore, that N.C.B. has standing to sue and advocate the rights of veterans on the basis of the *jus tertii* doctrine. Though not always labeled as applications of the *jus tertii* doctrine, the principle itself has a long history. In 1927 in *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed.

1070, the Supreme Court recognized the standing of two private schools to assert the constitutional rights of their students and the students' parents when such rights were being deprived by a state statute requiring universal attendance at public schools. The schools combined their economic injury and the students' constitutional rights to get standing in federal court. *See also Barrows v. Jackson,* 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586, wherein Supreme Court recognized the standing of an owner of real property subject to a restrictive covenant to sue on the basis of the constitutional rights of a third party purchaser; *Akron Board of Education v. State Board of Education of Ohio,* 490 F.2d 1285 (1974) *cert. denied* 417 U.S. 932, 94 S.Ct. 2644, 41 L.Ed.2d 236, wherein the Sixth Circuit recognized that a municipal school board and its superintendent had standing to assert the constitutional rights of the district's children; and *Singleton v. Wulff, supra,* wherein physicians challenging a state law prohibiting Medicaid payments for non-therapeutic abortions gained standing because the doctors showed that their economic injury and their patients constitutional rights were inextricably intertwined.

Most recently in *Craig v. Boren, supra,* the Oklahoma beer vendor was allowed standing by coupling the constitutional rights of Oklahoma males between the ages of 18 and 21 with the constriction of the plaintiff's market caused by the challenged statute that prohibited sale of 3.2 beer to males of that age bracket. Again, the litigants' economic injury coupled with the third party's constitutional rights in a particular rela-

tionship was sufficient to provide standing to sue in federal court.

VII.

Several theories have been advanced by plaintiffs to support the contention that 85–15 and the two-year rule are unconstitutional. Plaintiffs have urged with particular vigor that 85–15 and the two-year rule violate their right to equal protection of the laws; and as this Court perceives the issues, plaintiffs' most meritorious arguments have been those based upon an equal protection theory. Therefore, this Court elects to first examine the claims urged in light of the equal protection doctrine insofar as it is incorporated into the due process clause of the fifth amendment.

[12] We begin with the assumption that the due process clause of the fifth amendment incorporates the general principle of equal protection; namely, that persons similarly situated should be treated similarly. See *e.g. Bolling v. Sharpe,* 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954); *U. S. Dept. of Agriculture v. Moreno,* 413 U.S. 528, 93 S.Ct. 2821, 2825 n. 5, 37 L.Ed. 2d 782 (1973). The standards to be used for testing the constitutionality of federal classifications under the fifth amendment are virtually identical to the standards to be used in determining whether or not a state classification violates the equal protection clause of the fourteenth amendment. *Frontiero v. Richardson,* 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973). Our primary task is to ascertain what standards ought to be applied to test the classifications made by the challenged legislation.

The law of equal protection has changed greatly over the past century, and in recent years this particular branch of the law has evolved very rapidly to cover dimensions of our social, political and economic life which were heretofore beyond the ambit of equal protection. There does not at present appear to be unanimous agreement among the members of the Supreme Court as to the state of the law of equal protection. *See e. g. Craig v. Boren, supra,* where Justices Stewart, Blackmun, Powell and Stevens each wrote separate, concurring opinions and the Chief Justice and Justice Rehnquist wrote separate, dissenting opinions. This Court is obliged to search the case law and reason by analogy to reach a just result here. We readily admit that we are plowing new ground in an era when some of the old reference points are tending to fade away.

VIII.

The traditional approach to equal protection questions was to apply the standard set out in *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61, 78–79, 31 S.Ct. 337, 55 L.Ed. 369 (1911). The essence of that test is that legislation must be reasonable, not arbitrary or capricious, in making classifications among persons. Under the *Lindsley* approach, a challenged classification will be sustained if any state of facts can reasonably be conceived in support of it. One challenging a classification bears the burden of showing that it is arbitrary.

The prevailing and continuing concept of the traditional approach has been that of "rational relationship" or "substantial and fair relationship" between a

legitimate, governmental objective (easy to postulate) and a specific piece of legislation. The very nature of the concept allows for flexibility and adaptability; it also allows for easy judicial abdication. Thus, almost anything can pass the most minimal level of scrutiny which is allowable within the concept of rational relationship.

To apply this minimal level of review to the present lawsuit, the reasoning process must be as follows: (1) establish the purpose of the legislation; (2) examine the nature of the class created; and then (3) make inquiry to determine how, if at all, the two are linked together by reason.

The purpose of the legislation (both 85–15 and the two-year rule) is plain to this Court. As stated earlier in this opinion, both laws are an attempt to insure that veterans enroll in quality courses if federal dollars are going to help support those courses. Conversely, it can be said that the purpose of these laws is to prevent charlatans from grabbing the veteran's education money. These are the immediate, remedial goals of the legislation. As remedial measures they are intended to advance the ultimate goal of the legislation giving veterans educational benefits, the goal of helping veterans individually to improve themselves and their lot in society.

During the hearings some effort was directed toward demonstrating that there was no rational relationship between the problem of recouping overpayments to veterans and the 85–15 and two-year rules. That is certainly true, but as the government pointed out, 85–15 and the two-year rule are aimed at another problem

entirely; specifically, the problem of insuring quality education. For our purposes, overpayments are irrelevant. We must consider the link, if any, between the classifications made by the laws and the remedial purposes of those laws.

The classification complained of in this lawsuit is the classification of veterans receiving educational benefits apart from all other persons receiving federal funds to subsidize their educations. The 85–15 rule and two-year rule will under no circumstances operate to the detriment of individuals going to school on federal funds other than V. A. benefits. In short, there is a different treatment of persons based upon the type of federal subsidy for education which they receive.

The crux of the problem is in determining whether or not veterans and non-veterans getting federal money for education under different programs are really similarly situated. We conclude that they are. All are beneficiaries of one and the same thing: social legislation that is aimed at raising the educational level and hence the opportunities and capacities of a certain segment of the populace. In either case we are dealing with governmental largess. *cf.* C. A. Reich, "The New Property," 73 Yale Law Journal (1964). V. A. benefits have been called gratuities. ***Milliken v. Gleason,*** 332 F.2d 122, 123 (1st Cir. 1964), ***cert. denied*** 379 U.S. 1002, 85 S.Ct. 723, 13 L.Ed.2d 703 (1965). Veterans' educational benefits are a statutory entitlement as are benefits created by other social legislation, and we can see no reason in this case to distinguish them from other types of benefits under different names that subsidize higher education. By treating V. A. benefits

as governmental largess, however, this Court does not imply that recipients have no protected interest whatever in their continuation.

We have, therefore, a class of persons who are recipients of government largess for the purpose of furthering their education; within that class the recipients of one particular type of largess are singled out for special treatment. Congress has made a special class out of veterans receiving government funds for higher education in an effort to shield and protect every member of that class from abuses perpetrated upon them by unscrupulous recruiters who would otherwise entice them to enroll in substandard courses.

Under the minimum requirements of the rational relationship test discussed, *supra,* can this classification pass muster? We must ask whether any state of facts reasonably may be conceived to justify the discrimination. *McGowan v. Maryland,* 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961). Using that formulation of the applicable law, the answer to the question posed is necessarily affirmative.

All that is required are two assumed facts. First, one must assume that the market test really does work in education in the manner in which Congress apparently believes it does; in other words, courses at least two years old will be safer (of higher quality) than new courses, and courses where friends, relatives or students pay the total cost for at least 15 per cent of enrollees will be of higher quality than courses supported almost exclusively by veterans. Second, one must assume that veterans will be more gullible or more prone to abuse their benefits than other beneficiaries of government largess. On those two assumptions alone, a bridge of reasonable relationship can be built between the classification created by the legislation and the purpose to be achieved by the legislation.

If the minimum level of review available under the rational relationship test is the applicable standard of review in this case, plaintiffs ought to be sent home empty-handed. We have not done so for the reason that we believe something more is required; the standard of review to be applied must be more intense than that heretofore discussed.

IX.

[13] The traditional test for reviewing equal protection questions has been refined and developed by the United States Supreme Court in two respects: (1) A statutory classification based upon suspect criteria will be in jeopardy unless the state (government) can demonstrate a compelling interest as justification for said classification; (2) A classification affecting fundamental rights will likewise be in serious trouble unless a compelling governmental interest is demonstrated.

It is quite apparent that the classification complained of in this case is by no stretch of the imagination "suspect". Veterans as a class have no history of deprivation of rights by reason of their status as veterans. The consequences of being classified as veterans do not approach the consequences of classification by race, which is the only classification which can be termed "suspect" with any certainty. *See Graham v. Richardson,* 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971); *cf.*

Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971).

The Supreme Court has declined to hold that education is a fundamental right. *San Antonio School Dist. v. Rodriguez,* 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). That being the state of the law, we cannot proceed to assert that monetary benefits for higher education are a fundamental right; hence, the strict scrutiny test is not triggered by an alleged deprivation of education benefits.

It is noted that plaintiffs also contend that the fundamental right of interstate travel is impinged upon. On the basis of *Shapiro v. Thompson,* 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969), and *Dunn v. Blumstein,* 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972), they contend that this fundamental right must not be restricted in any manner, and on the basis of the right to travel they would have us invoke the strict scrutiny test. We have considered this idea and find it to be without merit.

No one could seriously argue that the right to interstate travel is less than fundamental. Before making any strict scrutiny of the legislation, however, it is necessary to make a preliminary search to discover whether or not this right is even arguably impinged upon. A cursory inquiry reveals the following: (1) The 85–15 rule has only the most attenuated connection with interstate travel; the most we could say is that a veteran residing in a state where the schools had a relatively low veteran population would be risking possible denial of benefits if he (she) contemplated moving to a state where schools had a relatively high veteran population.

(2) The nexus between the two-year rule and interstate travel is a little more obvious; yet the chain of reasoning between the rule and any possible impingement is again very attenuated. One would have to assume the existence of veterans in one particular state who seek to move to a second state wherein there existed no (or few) courses two years old or more that would meet the needs of the veterans in question. We have nothing to verify that kind of assumption.

A veteran could certainly protest that he wants to travel to some point in a foreign state and that, in the absence of an acceptable course at that situs, he would be deterred from moving. The right to travel, however, deals only with the right to travel across interstate lines, and does not include any inherent right to equal social and economic advantages at all points within the foreign state into which one hopes to travel.

Plaintiffs have also raised the right to associate freely and the right of privacy as potential fundamental interests that are infringed upon by the challenged legislation. We are unable to find a nexus between these rights in their present dimensions and the challenged rules.

At this juncture, therefore, we must conclude that although many ideas have been put forward, none carries enough weight to create in the mind of this Court the belief that a fundamental interest is at stake. Therefore, we must strike from consideration the strict scrutiny test as a proper standard for judging the classification herein presented to us.

X.

[14] During the 1970s there has been much discussion among commentators and court watchers on the question of whether or not in equal protection cases a standard of review somewhere between "strict scrutiny" and minimal inquiry in search of a "rational relationship" either has been constructed or is now emerging. One view is that a "middle tier," a medium level of review has come into being. *Reed v. Reed, supra,* and its progeny down to *Craig v. Boren, supra,* are accordingly viewed as examples of a "middle tier" approach. Justice Powell, concurring in *Craig v. Boren,* acknowledged this commonly articulated view of the Court's work and commented upon it as follows:

> As has been true of *Reed* and its progeny, our decision today will be viewed by some as a "middle-tier" approach. While I would not endorse that characterization and would not welcome a further subdividing of equal protection analysis, candor compels the recognition that the relatively deferential "rational basis" standard of review normally applied takes on a sharper focus when we address a gender-based classification. So much is clear from our recent cases. *Craig v. Boren,* Justice Powell concurring, 429 U.S. at 211, 97 S.Ct. at 464, see note.

The Supreme Court has, particularly in cases involving gender-based classifications, used an "elevated standard of scrutiny"[2] when the facts of a case are such as to

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[2] The phrase is from *Craig v. Boren, supra,* Mr. Justice Rehnquist dissenting, 429 U.S. at 216–218, at 97 S.Ct. at 467.

render the deferential rational relationship test inappropriate.

At this time it does not appear that there exists a verbal formula generally agreed upon that fairly conveys the meaning of this elevated standard of review. in *Craig v. Boren,* the Court required that a law creating a class based on gender be "substantially related" to an "important governmental objective." In *Reed v. Reed,* the Court required a "fair and substantial relation" between the legislation and the objective of the legislation. *Reed citing Royster Guano Co. v. Virginia,* 253 U.S. 412 at 415, 40 S.Ct. 560 at 861, 64 L.Ed. 989 (1920). The applicable standard must be gleaned from each case by looking at the concrete facts giving rise to the decision.

We think the following can be stated with reference to the state of the law in equal protection cases: (1) the two-tiered analysis of equal protection cases is an inadequate framework for analyzing recent work of the Supreme Court; (2) the framework is inadequate because some situations have been given less than strict scrutiny but more than minimal scrutiny; and (3) the standard of review for cases that do not fit the old mold is a pliable standard that is not easily captured but tends to be shaped by both the character of the class involved, and the seriousness of the interest allegedly impinged upon.

This pliable standard of review is evident in *Trimble v. Gordon.* —— U.S. ——, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977), where Mr. Justice Powell, writing for the majority in an opinion that struck down a classification based upon illegitimacy, stated:

> "[T]his Court requires at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose." . . . In this context, the standard just stated is a minimum; the Court sometimes requires more. "Though the latitude given state economic and social legislation is necessarily broad, when state statutory classification approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny . . ." quoting *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 at 172, 92 S.Ct. 1400 at 1405, 31 L.Ed.2d 768 (1972).

The case now before the Court is one where the interest at stake "approaches fundamental and personal rights." V. A. educational benefits can make the difference between a higher education that imparts marketable skills and no training for any sort of permanent occupation. In today's specialized society, higher education or training may not be "fundamental" within the narrow legal meaning of that term, but it is certainly essential to employment which will adequately support an individual and his or her family. The scrutiny required when such interests are at stake may not be the strictest but it is much more than the minimum.

In *Craig v. Boren* the class involved (sex) was not suspect, but it came close to being suspect. The interest involved was not fundamental, but rather far from fundamental, *i.e.*, the interest in legally buying 3.2 beer between the ages of 18 and 21. Here we have the converse. The class is not suspect, but rather far from suspect. The interest is close to fundamental. In this situation it would appear that the standard of review should be comparable to that applied in *Craig v. Boren*.

The government's objective is to reduce fraudulent and wasteful expenditures of money on bogus courses that lead nowhere—a praiseworthy objective. This remedial objective must, of course, be viewed in the context of the larger objective of veterans' programs; namely, to aid veterans in improving their capacities and opportunities by education. It is necessary to determine whether the challenged legislation bears a substantial relation to both the remedial goal and the more primary goal itself.

The challenged legislation could indeed eliminate bogus courses, but in the process, courses, and perhaps institutions, which especially serve veterans will be eliminated also. The challenged statutes are an example of legislative overkill. Fraud and waste are eliminated at the cost of eliminating quality educational opportunities for veterans. A statute that thus overreaches bears something less than a substantial relationship to important governmental objectives; hence, we must hold that the 85–15 rule and two-year rule are unconstitutional.

We are cognizant of the fact that social legislation in the past has not been subjected to as critical a level of scrutiny as that which we have herein applied. *See Dandridge v. Williams,* 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970). If the level of judicial scrutiny applied in cases such as *Dandridge v. Williams* is the law for this case, then the decision should be different.

We think the standard has changed since the time cases such as *Dandridge* were decided. Our rationale for concluding that this change has occurred is derived from our analysis of *Reed v. Reed* and its progeny. In

cases where the class distinctions are not based upon suspect criteria, but are close to being suspect, an intense review is required. We accept the proposition urged by plaintiffs that there has likewise been an elevation of the standard by which classifications are judged when interests impinged upon come close to interests categorized as fundamental.

One additional factor that has influenced this Court's decision should be noted; namely, the double-edged manner in which the new 85–15 rule is used. A veteran's enrollment cannot be approved for a course where more than 85 per cent of the students are subsidized in whole or in part by the educational institution, V. A. benefits, or grants from any federal agency. The recipients of all benefits for education from the federal government are thrown together with veterans for purposes of calculating the 85 per cent. But, when time comes for disapproving courses for veterans, then the drawing of class lines suddenly changes; then veterans stand alone to be cut off from benefits. This double-edged manner in which 85–15 is used is obnoxious; it is repugnant to the principle of equal protection.

The 85–15 rule looks innocuous at first glance. The more one ponders 85–15, however, the more troublesome it becomes. What the government gives on the one hand to needy students can arbitrarily cut off veterans who might be equally needy. If aid from federal agencies and educational institutions were to be directed heavily toward one poverty-stricken area to boost the fortunes of young persons hoping to get a higher education, veterans planning on an education could be frozen out indefinitely. The 85–15 rule has a built-in capacity to

sting veterans the worst when others are helped the most.

The foregoing contains this Court's findings of fact and conclusions of law and shall constitute the same.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED
June 24, 1977
WILLIAM J. SRSTKA
CLERK
mas

Johnnie L. Francis, Robert L. Martin, John L. Hughley, Cornell L. Conroy, and the National College of Business, Plaintiffs, vs. Max Cleland, Administrator, Veterans Administration, A. H. Thornton, Director, Veterans Administration Center, Defendants.	CIV76-5085 JUDGMENT AND ORDER

For the reasons stated in the accompanying Memorandum Opinion;

IT IS HEREBY ADJUDGED AND DECLARED that 38 U.S.C. § 1673(d) as amended by Section 205 of P.L. 94-502 (the 85-15 rule) and 38 U.S.C. § 1789(c) as amended by Section 509 of P.L. 94-502 (the two-year rule) are unconstitutional; and Plaintiff National Col-

lege of Business is granted the following injunctive relief:

IT IS ORDERED AND DECREED that Defendants be and hereby are permanently restrained and enjoined from enforcing 38 U.S.C. § 1673(d), or enforcing any certification or reporting obligation imposed thereby, and

IT IS ORDERED AND DECREED that Defendants be and hereby are permanently restrained and enjoined from enforcing 38 U.S.C. § 1789(c) or enforcing any certification obligation imposed thereby;

IT IS FURTHER ORDERED that any relief prayed for and which is not granted in this Order be and hereby is denied.

Dated this 24th day of June, 1977.

BY THE COURT:
ANDREW W. BOGUE
United States District Judge

NOTICE OF ENTRY
Take notice that the original of this copy was filed and entered in the office of the Clerk of the United States District Court for the District of South Dakota on the 24th day of June, 1977.
William J. Srstka, Clerk

ATTEST:
WILLIAM J. SRSTKA, Clerk
By MARY A. SHULTZ, Deputy

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA WESTERN DIVISION

Johnnie L. Francis, Robert L. Martin, John L. Hughley, Cornell L. Conroy, and the National College of Business, Plaintiffs, vs. Max Cleland, Administrator, Veterans Administration, A. H. Thornton, Director, Veterans Administration Center, Defendants.	CIV 76–5085 NOTICE OF APPEAL TO THE SUPREME COURT

Notice is hereby given that the defendant hereby appeals to the Supreme Court of the United States, pursuant to 28 U.S.C. § 1252 from the judgment of the District Court entered in this action on June 24, 1977.

Dated this 22nd day of July, 1977.

DAVID V. VROOMAN
United States Attorney
By Jeffrey L. Viken
Assistant U.S. Attorney

APPENDIX D

38 U.S.C. (Supp. V) 1673(d), as amended by Pub. L. 94–502, Section 205, 90 Stat. 2387, provides in pertinent part:

(d) The Administrator shall not approve the enrollment of any eligible veteran, not already enrolled, in any course (other than one offered pursuant to subchapter V, any farm cooperative training course, or any course described in section 1789(b)(6) of this title) for any period during which the Administrator finds that more than 85 per centum of the students enrolled in the course are having all or part of their tuition, fees, or other charges paid to or for them by the educational institution, by the Veterans' Administration under this title and/or by grants from any Federal agency. The Administrator may waive the requirements of this subsection, in whole or in part, if the Administrator determines it to be in the interest of the eligible veteran and the Federal Government.

38 U.S.C. (Supp. V) 1789, as amended by Pub. L. 94–502, Section 509, 90 Stat. 2401, provides:

(a) The Administrator shall not approve the enrollment of an eligible veteran or eligible person in any course offered by an educational institution when such course has been in operation for less than two years.

(b) Subsection (a) shall not apply to—

(1) any course to be pursued in a public or other tax-supported educational institution;

(2) any course which is offered by an educational institution which has been in operation for

more than two years, if such course is similar in character to the instruction previously given by such institution;

(3) any course which has been offered by an institution for a period of more than two years, notwithstanding the institution has moved to another location within the same general locality, or has made a complete move with substantially the same faculty, curricula, and students, without change in ownership;

(4) any course which is offered by a nonprofit educational institution of college level and which is recognized for credit toward a standard college degree;

(5) any course offered by a proprietary nonprofit educational institution which qualifies to carry out an approved program of education under the provisions of subchapter V or VI of chapter 34 of this title (including those courses offered at other than the institution's principal location) if the institution offering such course has been in operation for more than two years; or

(6) any course offered by an educational institution under a contract with the Department of Defense that (A) is given on, or immediately adjacent to, a military base; (B) is available only to active duty military personnel and/or their dependents and (C) has been approved by the State approving agency of the State in which the base is located.

(c) Notwithstanding the provisions of subsection (b)(1), (2), (3), or (4) of this section, the provisions

of subsection (a) shall apply to any course offered by a branch or extension of—

(1) a public or other tax-supported institution where the branch or extension is located outside of the area of the taxing jurisdiction providing support to such institution; or

(2) a proprietary profit or proprietary nonprofit educational institution where the branch or extension is located beyond the normal commuting distance of such institution.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1977—250-471/94

No. 77-716

In the Supreme Court of the United States

OCTOBER TERM, 1977

MAX CLELAND, ADMINISTRATOR OF THE VETERANS ADMINISTRATION, ET AL., APPELLANTS

v.

NATIONAL COLLEGE OF BUSINESS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA

SUPPLEMENTAL MEMORANDUM FOR THE APPELLANTS

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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No. 77-716

MAX CLELAND, ADMINISTRATOR OF THE VETERANS ADMINISTRATION, ET AL., APPELLANTS

v.

NATIONAL COLLEGE OF BUSINESS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA

SUPPLEMENTAL MEMORANDUM FOR THE APPELLANTS

Since the filing of appellants' jurisdictional statement, legislation has been adopted which modifies both the 85-15 requirement and the two-year rule that are at issue in this case. On November 23, 1977, the President signed Pub. L. 95-202, the GI Bill Improvement Act of 1977 (H.R. 8701, 95th Cong., 1st Sess.). See 13 Weekly Comp. of Pres. Doc. 1802. The pertinent portions of the Act are included as Appendix A, *infra*.

Section 305(a)(1)(B) of the new Act authorizes the Administrator to waive the two-year rule as applied to branches or extensions of educational institutions pursuant to 38 U.S.C. (Supp. V) 1789(c), as added by Section 509 of Pub. L. 94-502, 90 Stat. 2401, "in whole or in part, if the Administrator determines, pursuant to regulations

which the Administrator shall prescribe, it to be in the interest of the eligible veteran and the Federal Government."[1]

Section 305(a) of the new Act modifies the 85-15 requirement in several respects. First, Section 305(a)(2)(B) exempts any institution in which veterans' enrollment is no more than 35 percent of total enrollment from course-by-course computation of the 85-15 requirement, except that if the Administrator has cause to believe that veterans' enrollment in a particular course exceeds 85 percent of total enrollment for that course, the Administrator may enforce the requirement as to that course. Second, Section 305(a)(3) requires the Administrator to conduct a study regarding the need for computing the percentage of students receiving grants from all federal sources and the problems in making such computations; it further provides that students receiving federal grants from sources other than the Veterans Administration shall not be included in the 85 percent quota until six months after the completion of this study and "until such time as the Administrator shall determine * * * that there is an adequate and feasible system for making such computations and that it is desirable and necessary to make such computations * * *."[2]

---

[1]Section 305(a)(1)(A) also permits the Administrator to waive, in whole or in part, the requirements of 38 U.S.C. (Supp. V) 1789(b)(6), as added by Section 509 of Pub. L. 94-502, 90 Stat. 2401, which exempts from the two-year rule courses offered by educational institutions under contract with the Department of Defense if certain requirements are met.

[2]Section 501 of the Act states that, with certain exceptions, the Act is to be effective on the first day of the first month beginning 60 days after the date of enactment, *i.e.*, on February 1, 1978. Pursuant to an exception in Section 501, Section 305(a)(3) became effective on the date of enactment, November 23, 1977.

Since the new Act modifies both provisions that the district court held unconstitutional, it may be appropriate for the Court to vacate the judgment below and remand the case for consideration of the effect of these amendments. However, if the case is remanded, for the reasons stated in the jurisdictional statement (J.S. 7-10), the district court should be directed to sustain the constitutionality of these statutes if it finds that they have a reasonable basis.[3]

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

DECEMBER 1977.

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[3]As noted in appellants' jurisdictional statement, the district court concluded even prior to the 1977 amendments that the provisions in question had a rational basis, but it applied a more demanding standard and found the statutes unconstitutionally overbroad. Nothing in the 1977 amendments affects the selection of the standard of review or undermines the district court's finding of a rational basis. To the contrary, the amendments narrow the sweep of both the two-year rule and the 85-15 requirement and thereby more precisely tailor those provisions to meet the particular evils they are intended to remedy.

DOJ-1977-12

APPENDIX A

The GI Bill Improvement Act of 1977, Pub. L. 95-202, H.R. 8701, 95th Cong., 1st Sess. (1977), provides in pertinent part:

SEC. 305. (a)(1) Section 1789 of title 38, United States Code, is amended by—

(A) inserting at the end of subsection (b) immediately below clause (6) the following new sentence:

"The Administrator may waive the requirements of clause (6) of this subsection, in whole or in part, if the Administrator determines, pursuant to regulations which the Administrator shall prescribe, it to be in the interest of the eligible veteran and the Federal Government."; and

(B) adding at the end of subsection (c) the following new sentence: "The Administrator may waive the requirements of this subsection, in whole or in part, if the Administrator determines, pursuant to regulations which the Administrator shall prescribe, it to be in the interest of the eligible veteran and the Federal Government.".

(2) Section 1673(d) of title 38, United States Code, is amended by—

(A) inserting in the second sentence a comma and "pursuant to regulations which the Administrator shall prescribe," after "determines"; and

(B) inserting at the end thereof the following new sentences: "The provisions of this subsection shall not apply to any course offered by an educational institution if the total number of veterans and persons receiving assistance under

this chapter or chapter 31, 32, 35, or 36 of this title who are enrolled in such institution equals 35 per centum or less, or such other per centum as the Administrator prescribes in regulations, of the total student enrollment at such institution (computed separately for the main campus and any branch or extension of such institution), except that the Administrator may apply the provisions of this subsection with respect to any course in which the Administrator has reason to believe that the enrollment of such veterans and persons may be in excess of 85 per centum of the total student enrollment in such course.".

(3) The Administrator of Veterans' Affairs, in consultation with other appropriate departments and agencies, shall conduct a study to examine the need for computing, under section 1673(d) of title 38, United States Code, the percentage of those students enrolled in courses at educational institutions who are in receipt of grants from any Federal department or agency, and the problems of such institutions in making such latter computations, and shall, not later than September 30, 1978, submit a report to the Congress indicating whether such computations are needed and prescribing in detail an adequate system for making such computations. Until the expiration of six months after the date of submission of such report and until such time as the Administrator shall determine, based on such report, that there is an adequate and feasible system for making such computations and that it is desirable and necessary to make such computations, the Administrator shall not apply the provisions contained in section 1673(d) of title 38, United States Code, requiring educational

institutions in determining compliance with such subsection to compute the numbers of students in receipt of Federal grants other than from the Veterans' Administration.

* * * * *

SEC. 501. The provisions of this Act shall become effective on the first day of the first month beginning 60 days after the date of enactment of this Act, except that the provisions of title I and section 304(a)(1)(A) shall be effective retroactively to October 1, 1977, the provisions of sections 201 and 202 shall become effective on January 1, 1978, the provisions of section 203 shall be effective retroactively to May 31, 1976, and the provisions of sections 301, 302(2), 304(a)(1)(B), 304(a)(2), 305(a)(3), 305(b)(2), 305(b)(3), 305(b)(4), 305(c), 306, 307, 308, 309, and 310 and of title IV shall be effective upon enactment.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-716

MAX CLELAND, ADMINISTRATOR OF THE VETERANS ADMINISTRATION, *et al.*,

Appellants,

v.

NATIONAL COLLEGE OF BUSINESS,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-716

MAX CLELAND, ADMINISTRATOR OF THE VETERANS ADMINISTRATION, *et al.*,

Appellants,

v.

NATIONAL COLLEGE OF BUSINESS,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA

MOTION TO DISMISS OR AFFIRM

This appeal brings before the Court two statutory restrictions upon the payment of veterans' educational benefits, which sharply impact those veterans who can utilize these benefits only by attending college at night. In an effort to eliminate payment of veterans' benefits to veterans attending some unworthy schools, Congress has imposed conditions which will deprive veterans in some parts of the country of any realistic opportunity to use these benefits.

Appellee National College of Business is a fully accredited, non-profit, degree-granting senior college of business, with an outstanding record of placing its graduates

in responsible business positions. Its main campus, situated in Rapid City, South Dakota, offers the only advanced business education available at night within a radius of more than 400 miles. The requirements at issue in the present case deny veterans' educational benefits if 85% of those attending a course are receiving veterans' benefits or institutional financial aid or if the course has been given for less than two years. These requirements were extended to degree-granting colleges in 1976. If applied to the College, they would deprive veterans attending the College's night courses of veterans' educational benefits, and might force the College itself to close its doors.

The United States District Court for the District of South Dakota, Honorable Andrew W. Bogue, U.S.D.J., held that the "85-15" and "two year" rules, as applied to the College, discriminated unjustifiably against veterans attending the College and thus denied them the due process of law guaranteed by the Fifth Amendment. For the reasons set forth below, appellee submits that this holding was plainly correct, and should be affirmed by this Court.

Questions Presented

1. As applied to appellee National College of Business, do the "85-15" rule of 38 U.S.C. § 1673(d) and the "two year" rule of 38 U.S.C. § 1789 discriminate so unjustifiably against veterans attending the College as to deny them due process of law under the Fifth Amendment to the United States Constitution?

2. As applied to the College, do the "85-15" rule and the "two year" rule impose such arbitrary and unnecessary limits upon the freedom of educational choice of veterans attending the College as to deny them due process of law

under the Fifth Amendment to the United States Constitution?

3. Did the procedures followed by the Veterans Administration in applying the "85-15" rule and the "two year" rule to the College and the veterans attending it deny them procedural due process of law under the Fifth Amendment to the United States Constitution?

Statement of the Case

The purpose of this statement is briefly to set forth the facts in the record relating to the background of the present controversy, substantially all of which have been omitted from appellants' Jurisdictional Statement.

1. The National College of Business

Appellee National College of Business ("the College") is a senior college of business with its main campus in Rapid City, South Dakota (Pl. Ex. 11). In addition to conducting day and evening sessions at Rapid City, the College offers night classes at thirteen extension locations in the Midwest and Far West (Pl. Ex. 24). It is a not-for-profit institution (Pl. Ex. 24, p. 5), and is accredited by the Association of Independent Colleges and Schools (Tr. 114).*

The College's home campus was founded in 1941 as a proprietary secretarial school offering a one-year course of studies (Pl. Ex. 24). The curriculum was subsequently expanded and in 1962 the College was authorized to grant

* This is the same accrediting agency that accredits the major colleges and universities in the country. In the University of South Dakota's Report of Credit Given, the College is given the highest rating which can be given to a non-liberal arts institution (Tr. 235; Pl. Ex. 8). By reason of this rating, credits earned at the College are accepted on transfer by many institutions, such as Indiana University (Pl. Ex. 8).

Associate in Science degrees (*ibid.*). In 1970 it was granted the authority to confer Bachelors degrees (*ibid.*).

The College is nationally recognized as a leader in business education (Tr. 31). It offers a high quality education to its students in a number of fields of technical business skills (Tr. 31; Pl. Exs. 23, 24). The Rapid City campus, at the present time, offers programs leading to diplomas, Associate degrees, and Bachelors degrees in areas such as accounting, business administration, and data processing (Pl. Ex. 11). Its placement record has been excellent (Tr. 91-92). The employers of its graduates have expressed approval (Pl. Ex. 7). As the most recent accrediting committee report on the College found, the instructors are both qualified and responsive to the needs of the students and the College's administration provides energetic leadership for the College (Pl. Exs. 23, 24).

The College has proven to be a valuable community resource for older persons who wish to better their employment potential through education (particularly veterans whose education was interrupted by military service), and who have family responsibilities and jobs which compel them to turn to evening education instead of traditional daytime programs (Tr. 138). The College offers the only night business education program in the Rapid City vicinity. Without its programs, many veterans and other students would be compelled to forego higher education altogether (Tr. 97-98; Pl. Ex. 18).

The College's extension locations, the first of which was founded in 1974 (Pl. Ex. 13-A), have continued the main campus's tradition of providing a quality business education. The extensions were established in areas where no comparable night programs were available (Pl. Ex. 23). The extensions offer only a program leading to a Bachelor

of Science degree in Business Administration (Pl. Ex. 23). All of the extensions received accreditation after careful study (Pl. Exs. 21, 23, 24). The qualifications of the instructors, the suitability of classroom and library facilities, and the general needs of students are carefully supervised from Rapid City (Pl. Exs. 23, 24). The success of these efforts is attested by the favorable findings on the extension programs contained in the accreditation reports (Pl. Exs. 23, 24).

Thus, the College is a tested, experienced institution of higher learning which at all of its locations provides an effective and useful education for its students.

Until 1976 the operations of the College, both at its main campus and at its extensions, were not subject to either the "85-15" rule, 38 U.S.C. § 1673(d), or the "two year" rule, 35 U.S.C. § 1789, because these restrictions did not apply to courses leading to a standard college degree. During this period the record discloses no difficulties between the College and the Veterans Administration, and no intimation of "abuses" of the veterans' educational benefits program by the College.

2. The Impact of Public Law 94-502 Upon the College

The "85-15" requirement was first enacted in 1952. 66 Stat. 667 (1952). It applied to courses below the college level, and provided that a veteran's application for benefits should be disapproved if more than 85% of the students taking the course were having all or part of their costs paid by the Veterans Administration. Public Law 94-502, 90 Stat. 2383 (1976), tightened this restriction in two respects: (1) it extended the restriction to degree-granting institutions like the College; and (2) it included in the computation of the 85% figure not only all students receiving veterans'

benefits but also all students receiving all or part of their tuition from other Federal agencies or from the school itself.

The predecessor of the "two year" rule was first enacted in 1949. 63 Stat. 653 (1949). The "two year" rule provided that a veteran's application for benefits should be disapproved if the course in question had not been in operation for at least two years, unless certain exemptions were met. The "two year" rule originally exempted degree-granting institutions. Public Law 94-502, however, added a proviso, 38 U.S.C. § 1789(c), excluding from this exemption courses offered at a branch or extension of a proprietary profit or non-profit educational institution if the branch is located outside the normal commuting distance of the mother institution.

The enactment of Public Law 94-502 had a seismic effect upon the College. For the first time, the College became subject to the "85-15" and "two year" rules. As a result, no veteran's enrollment or re-enrollment for most of its courses could be approved by the Veterans Administration. The number of students of the College who receive some form of Federal financial aid (all of whom were now counted toward the 85% under the revised "85-15" rule) has been increased by the serious drought which struck the midwestern portion of the country, and most of the College's non-veteran students are now eligible for other Federal educational benefits (*see* Pl. Ex. 13-c). John W. Hauer, President of the College, testified that if the rules were applied to the College, the existence of many of the College's branches would be jeopardized and the College as a whole might be forced to close (Tr. 148-49).

Immediately after the passage of Public Law 94-502, the College requested a waiver of the application of the "85-15" rule to all of its facilities, pursuant to 38 U.S.C.

§ 1673(d), as amended by Public Law 94-502, which authorizes the Administrator to waive the application of the "85-15" rule upon a finding that the waiver is "in the interest of the eligible veteran and the Federal Government" (*see* Complaint, Ex. F). The Veterans Administration, however, denied this application, maintaining that "blanket" waivers were not authorized by the statute and that it would not grant waivers for specific locations until administrative guidelines were promulgated (*ibid.*).*

3. The Decision of the District Court

On December 31, 1976, the College and four of its students filed suit in the United States District Court for the District of South Dakota, challenging the constitutionality of the extended "85-15" and "two year" rules (J.S. App. 1a). On that day, Honorable Andrew W. Bogue granted plaintiffs' request for a temporary restraining order (J.S. App. 1a-2a).

A hearing on plaintiffs' motion for a preliminary injunction was held on January 17 and February 7, 1977, at the close of which Judge Bogue consolidated consideration of the prayers for preliminary and permanent relief (Tr. 312). During these hearings, the plaintiffs produced substantial and uncontroverted evidence regarding the high quality of education offered at all of the College's branches (*e.g.*, Tr. 106-246; Pl. Exs. 20-24).

The District Court rendered its decision on June 25, 1977. It initially ruled that although the individual plain-

* The only guidelines which have been promulgated by the Veterans Administration for waivers of the "85-15" and "two year" rules foreclose a waiver from the "85-15" rule for any course with more than 85% veterans, and deny relief from the "two year" rule except for the exceptions mandated by statute and two other narrowly specialized exceptions which are irrelevant here, even if other comparable courses are completely unavailable in a given area. *See* 42 Fed. Reg. 42951, 42953 (Aug. 25, 1977).

tiffs lacked standing, the College did have standing to maintain the action (J.S. App. 10a-20a). On the merits, the Court held that the expanded "85-15" and "two year" rules were so inconsistent with fundamental concepts of equality as to violate the Fifth Amendment's due process clause (J.S. App. 10a-23a). In view of this holding, the District Court did not reach the other issues raised by plaintiffs' complaint, including the issues of substantive due process and procedural due process which are discussed in Points II and III below. Although the District Court did not reach these issues, this Court may affirm the judgment below upon these grounds as well as upon that relied upon by the District Court. *See, e.g., California Bankers Ass'n* v. *Schultz,* 416 U.S. 21, 71 (1974).

4. The 1977 Amendments to the "85-15" and "Two Year" Rules

Public Law 95-202, which was signed by the President on November 23, 1977, after the present appeal had been taken, made very limited changes in the "85-15" and "two year" rules. With respect to the "85-15" rule, Section 305(a)(3) of this law provides that students receiving Federal grants other than veterans' benefits shall not be included in the 85% computation pending a study by the Veterans Administration of the need for and feasibility of such inclusion.* With respect to the "two year" rule, Section 305 (a)(1)(B) authorizes the Administrator to waive its application to branches or extensions "if the Administrator determines, pursuant to regulations which the Administrator shall prescribe, it to be in the interest of the eligible

* Section 305(a)(2)(B) also exempts any institution in which veterans' enrollment is 35% or less from course-by-course enforcement of the "85-15" rule, except that the Veterans Administration may enforce the rule against any course in which it has reason to believe veterans' enrollment exceeds 85%.

veteran and the Federal Government." These amendments take effect on February 1, 1978.

In a Supplemental Memorandum filed in December 1977, the appellants suggest that "it may be appropriate" for the Court to remand this case for consideration of the effect of these amendments. A remand for such a narrow purpose would be useless. The 1977 amendments leave in effect the discrimination between veterans and non-veterans which the District Court found to be unconstitutional. The Administrator's power to grant a waiver from the "85-15" rule was equally broad under preexisting law; he has simply refused to exercise it in the case of any course with more than 85% veterans, even if no alternative course is available to veterans in the area in question (*see* p. 8 *supra*). Most of the College's courses have an enrollment of 85% veterans or more.

Appellants do not state how the 1977 amendments would affect the litigation. They do not suggest that there is any likelihood that the Veterans Administration will be willing to approve veterans' benefits for students at the College under the 1977 amendments. They do not even suggest that the Veterans Administration is prepared to consider expeditiously whether the application of the "85-15" and "two year" rules to the College is unnecessary. In the absence of any assurance that the Veterans Administration is at least willing to give serious and open-minded consideration to the question whether the "85-15" and "two year" rules should be applied to the College, appellants' suggestion of a remand should be denied (*see* Point IV *infra*).

ARGUMENT

For the following reasons, appellee submits that the result reached by the District Court was correct, and should be affirmed by this Court.

I.

The Extended "85-15" and "Two Year" Rules Violate the Standards of Equality Embodied in the Due Process Clause of the Fifth Amendment, Regardless of What Level of Scrutiny Is Employed.

Although the Fifth Amendment does not contain an equal protection clause, it does forbid discrimination that is so unjustifiable as to violate due process of law. *See, e.g., Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528, 533 n.5 (1973); *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954). The District Court, in invalidating the amended "85-15" and "two year" rules, considered it necessary to employ a "middle tier" level of equal protection scrutiny to reach that result (J.S. App. 28a-32a). For the reasons given in Point I(B) below, appellee agrees that a heightened level of scrutiny is appropriate in this case. For the reasons set forth in Point I(A), however, appellee submits that the extended "85-15" and "two year" rules deny equal protection even under a less exacting standard of equal protection.

A. The Discriminations Involved in the "85-15" and "Two Year" Rules Are Without Any Rational Basis

The minimum standard of rationality which legislative classifications must meet under the Constitution was set

forth by this Court in *F. S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920):

> "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

See also, e.g., Johnson v. *Robison*, 415 U.S. 361, 374-75 (1974).

The extended "85-15" and "two-year" rules offend this basic standard of rationality in at least two fundamental respects. First, these rules discriminate between veterans receiving Federal educational benefits, on the one hand, and all other persons receiving Federal educational grants of any kind, on the other hand. Second, these rules discriminate between veterans living in areas where equivalent courses of study are offered by institutions which comply with the "85-15" and "two year" rules, on the one hand, and veterans living in areas (such as those served by the College) where no institutions offering a business education at night are able to meet the "85-15" and "two year" rules.

The basic fallacy of the legislation is its effort to avoid the formulation and application of qualitative standards for veterans' college education by reliance upon a mechanical formula (*see* Point II *infra*). In its execution of this scheme Congress acted without any rational basis in its impact upon smaller communities and in singling out veterans as the only Federal beneficiaries to be so circumscribed.

The disparity of treatment between veterans and other recipients of Federal educational opportunity grants is particularly abrasive because recipients of other Federal

educational grants, such as Basic Educational Opportunity Grants (B.E.O.G.) and Supplemental Educational Opportunity Grants (S.E.O.G.), were included by Public Law 94-502 in the computation of the 85% limitation under the "85-15" rule. Under this formula, if the total number of recipients of Federal educational grants—veteran and non-veteran—exceeds 85% of the total number of students, then the veterans are denied benefits entirely under the "85-15" rule, while non-veterans continue to receive their benefits exactly as they did before.* Similarly, the "two year" rule applies only to veterans, permitting non-veterans to use Federal educational grants to attend institutions which do not comply with this rule.**

This discrimination between veterans and non-veterans cannot be justified in terms of any rational legislative goal. As found by the District Court, the purpose of the "85-15" and "two year" rules is to insure the educational quality of courses taken by veterans (J.S. App. 31a)—an obviously redundant requirement for a fully accredited degree-granting institution. This is the only purpose which the appellants contend is served by either rule (J.S. 10-15).

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* As noted above (p. 8), Section 305(a)(3) of Public Law 95-202 has temporarily suspended the inclusion of recipients of other Federal educational grants from the 85% computation unless and until the Veterans Administrator determines, after completion of a study, "that it is desirable and necessary to make such computations . . . ." In all respects, however, Public Law 95-202 leaves unchanged the intended discrimination between veterans and non-veterans under the "85-15" and "two year" rules. Notwithstanding the temporary change in computation, it still denies benefits to veterans, while permitting them to other federally assisted students.

** This discrimination between veterans and non-veterans takes on added significance in light of the fact that almost 50% of Federal educational benefits are now paid to non-veterans, and that Federal educational benefit programs now aid more non-veterans than they do veterans. S. Rep. No. 94-1243, 94th Cong., 2d Sess. 89 (1976).

In terms of this legislative purpose, the distinction between veterans and non-veterans is utterly irrational and arbitrary. If falling afoul of the "85-15" and "two year" rules could be said to prove an institution unworthy of attendance by recipients of Federal educational benefits, then this would be just as true of non-veterans receiving Federal benefits as it would be of veterans receiving veterans' educational benefits.

Appellants' Jurisdictional Statement does not attempt to argue that this discrimination is rationally related to any legitimate legislative purpose. The Jurisdictional Statement does argue at some length that the "85-15" and "two year" rules "are reasonably related to the prevention of wasteful expenditures of veterans' educational benefits" (J.S. 15). But this argument does not meet the equal protection issue. Here the question is not whether the "85-15" and "two year" rules themselves have any conceivable rational basis.* The question here is whether the discrimination inherent in applying such rules to veterans and not to non-veterans has any rational basis. Appellants have not tried to suggest any rational basis for this discrimination.

In a footnote at the very end of the Jurisdictional Statement, appellants advance the familiar argument that Congress may legislate with respect to one field at a time (J.S. 15-16 n.15). But this is not what Congress has done. Congress has dealt simultaneously with Federal educational benefits paid to both veterans and non-veterans, by pro-

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* As shown in Point II below, the distinctions drawn by the "85-15" and "two year" rules between courses which have more or less than 85% veterans, or which have been in existence for less or more than two years, are themselves so arbitrary and unrelated to the educational quality of the courses as to violate the due process clause of the Fifth Amendment.

viding that they shall both be taken into account in computing the 85% limitation, but that only veterans shall be denied Federal educational benefits if this limit is exceeded.* Thus the discrimination in this case is not the inadvertent result of Congressional action in one field at a time; it is the deliberate result of an intent to discriminate among the recipients of Federal educational benefits.

Besides drawing an irrational and impermissible distinction between veterans and non-veterans, the expanded "85-15" and "two year" rules create wholly arbitrary discriminations against veterans who live in sparsely populated areas. Unlike most students whose education was uninterrupted by war or military service, many veterans are at an age where they have both a family and a full-time job, but they nonetheless wish to use veterans' benefits to attend evening classes to acquire additional education and a better job. They cannot readily move to a metropolitan center for part-time education. These veterans, like those in the Rapid City area, have a limited choice of evening educational programs. If there is no alternative educational program useful to them in their area, invocation of the "85-15" or "two year" rules will deprive them of any opportunity to utilize veterans' educational benefits. This is the case in the Rapid City area and other areas in which the College offers evening courses (*see* p. 4 *supra*). It appears to be the case in other areas as well. *See, e.g.,*

* As noted above (p. 8), Public Law 95-202 has temporarily removed non-veterans from the computation of the 85% pending further study. This action simply confirms once again that Congress has focused upon the discriminatory impact of the "85-15" and "two year" rules, and has deliberately continued the discrimination which is inherent in denying benefits to veterans but not to non-veterans, regardless of how the 85% is computed. Nowhere in the legislative history of Public Law 95-202 is there any suggestion of a rational basis for this discrimination.

Rolle v. *Cleland*, 435 F. Supp. 260, 263 n.5 (D.R.I. 1977). Veterans who live near some major metropolitan areas, on the other hand, may be expected to have a wider choice of educational programs and are thus less likely to be adversely affected by the "85-15" and "two year" rules.

Although the Constitution does not impose a *per se* rule of territorial uniformity on legislative action, *see, e.g., San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 54 n.110 (1973); *Salsburg* v. *Maryland*, 346 U.S. 545, 552 (1954), it does forbid territorial distinctions which have no rational basis. *See, e.g., Gordon* v. *Lance*, 403 U.S. 1, 4 (1971). There would appear to be no justification for treating geographically distinct groups of veterans in such a disparate manner, and appellants have suggested none, particularly in view of the stated purpose of Public Law 94-502—to assist young people "in obtaining an education they might not otherwise be able to afford." Pub. L. 94-502, § 404, 90 Stat. 2393 (1976). Surely this purpose is equally applicable in all sections of the Nation. A standard may not be so crudely drawn that it unnecessarily and arbitrarily forecloses one class of beneficiaries because of geographical considerations from benefits intended to be even-handed and nationwide.

B. The District Court Correctly Concluded That a Heightened Level of Scrutiny Is Appropriate in this Case

Although, as shown in Point I(A) above, the distinction between veterans and non-veterans in the application of the "85-15" and "two year" rules is not supported by any rational basis, an even more demanding standard of review is warranted in this case.

In recent years, this Court, on a number of occasions, has subjected legislative classifications to a more searching inquiry than that afforded by the rational basis test, al-

though not as demanding as the strict scrutiny utilized in controversies involving suspect classifications or fundamental rights. This approach was summarized last Term in *Trimble* v. *Gordon*, 430 U.S. 762, 766-67 (1977):

> "'[T]his Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose.' *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972). In this context, the standard just stated is a minimum; the Court sometimes requires more. 'Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny . . . .' *Ibid.*"

Contrary to appellants' suggestion (J.S. 9), this stricter approach has not been confined to cases dealing with gender and legitimacy classifications. In *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528 (1973), this Court struck down a statute which denied Federal Food Stamp benefits to households containing one or more members who are unrelated to the rest by utilizing a standard of review more searching than the traditional rational basis test. *Moreno*, indeed, is particularly apposite in this case since it involved a governmental benefit program, and because one of the alleged justifications for the distinction between households containing related and unrelated persons which was held insufficient by this Court was that it was designed to minimize the possibility of fraud and abuses in the Food Stamps program. This Court held in *Moreno* that even if households containing unrelated persons posed a greater threat of abuses, Congress was required to employ more delicate tools to detect potential abusers. *See* 413 U.S. at 535-38. *See also Jimenez* v. *Weinberger*, 417 U.S. 628, 636-37 (1974); *United States Department of Agriculture* v. *Murry*, 413 U.S. 508, 513-14 (1973); *Eisenstadt* v. *Baird*, 405 U.S. 438, 452-55 (1972) (distinction between single persons and married persons).

This heightened level of scrutiny is equally appropriate in this case. As the District Court noted (J.S. App. 30a), education, although not a fundamental right in the constitutional sense, *see San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 35-37 (1973), is an important personal right. *See, e.g., Wisconsin* v. *Yoder*, 406 U.S. 205, 213-14 (1972). It is certainly more readily classifiable as a "sensitive" personal right—the factor which *Trimble* identified as the trigger for heightened scrutiny—than the rights at stake in some of this Court's cases which have employed such a level of scrutiny. *See, e.g., Craig* v. *Boren*, 429 U.S. 190 (1976) (right to purchase 3.2 beer). Moreover, *Rodriguez* does not necessarily foreclose the application of intensified scrutiny in this case. The Court there specifically reserved the question whether classifications which had the effect of absolutely denying educational opportunities to certain groups might be subjected to more searching examination. *See* 411 U.S. at 37. In this case application of the "85-15" and "two year" rules to certain veterans, particularly those residing in sparsely populated areas, will have the practical effect of denying them *any* higher education of the kind they require (*see* p. 4 *supra*), a situation which is markedly different from *Rodriguez* where all students at the relevant levels received some education. Appellee submits that since the classification involved here involves a *de facto* absolute denial of continued education to some veterans, heightened scrutiny is appropriate.

Under this standard of review, the distinction drawn between veterans and beneficiaries of other Federal educational benefit programs cannot stand. As we have pre-

viously demonstrated (*see* pp. 12-14 *supra*), the professed legislative purpose underlying the "85-15" and "two year" rules is equally applicable to non-veterans. Moreover, even if there were a greater possibility of "abuses" being directed at recipients of veterans' benefits—and appellants have pointed to no evidence that this is so—Congress should be required, as was the case in *Moreno, supra,* to employ more sensitive tools for eliminating abuses rather than the blunderbuss attack of these rules.

II.

The Expanded "85-15" and "Two Year" Rules Impose Such Arbitrary and Unnecessary Limits Upon the Freedom of Educational Choice of Veterans Attending the College as to Deny Them Due Process of Law Under the Fifth Amendment.

This Court has consistently held that freedom of educational choice is a right of fundamental constitutional importance which is protected by substantive due process under the Fifth and Fourteenth Amendments. In *Meyer* v. *Nebraska,* 262 U.S. 390, 399-403 (1923), and *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534-35 (1925), this Court held that the due process clause of the Fourteenth Amendment restrains a State from arbitrary or unnecessary restriction of the freedom of educational choice. In *Griswold* v. *Connecticut,* 381 U.S. 479, 482-83 (1965), this Court reaffirmed the principle of the *Meyer* and *Pierce* cases. *See also, e.g., Moore* v. *City of East Cleveland,* 431 U.S. 494, 501 n.8 (1977) (opinion of Powell, *J.*).

In *Vlandis* v. *Kline,* 412 U.S. 441 (1973), this Court held unconstitutional a Connecticut statute which imposed higher tuition and other fees upon nonresidents attending Connecticut State universities, and which conclusively presumed that persons whose legal address was outside Connecticut at the time of their application remained nonresidents for their entire period of attendance at the university. The Court held that such a statutory assumption violated due process "when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination." 412 U.S. at 452.

The "85-15" and "two year" rules at issue in the present case strongly resemble the statute held unconstitutional in *Vlandis* v. *Kline.* The "85-15" and "two year" rules are based upon the assumption that courses which have been in existence for less than two years, or in which 85% of the students are receiving financial aid from the institution or from the Federal Government, are of substandard educational quality. The uncontradicted testimony in the record establishes that there is, in fact, no rational relationship between a course's failure to satisfy the "85-15" and "two year" rules and the quality of the course (*see, e.g.,* Tr. 201-03, 255-56). The College itself is concededly an outstanding and successful educational institution, whose quality is attested by its full accreditation (*see* pp. 3-5 *supra*). Appellants themselves conceded in response to a question from the District Court that they were not contending that the College has been guilty of any of the "abuses" at which the "85-15" and "two year" rules are aimed (Tr. 277-78).

Under these circumstances, the statutory assumption that a college course which does not satisfy the "85-15" and "two year" rules is academically substandard is arbitrary and unconstitutional under the standard of *Vlandis* v. *Kline.* As in *Vlandis* v. *Kline,* the Government here "has reasonable alternative means of making the crucial determination." In the present case, these alternatives are accreditation, the employment record of the institution's graduates,

and administrative compliance surveys of the courses offered by the institution to veterans.*

Appellants contend that restrictions upon the payment of governmental benefits are subject to a minimal due process standard of rationality, citing *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970) (J.S. 7-8). For the reasons given above, the "85-15" and "two year" rules do not meet even this minimum standard. Equally important, however, veterans' benefits are not mere governmental gratuities. As shown by the record in this case, military recruiting efforts stress that potential enlistees can "earn" veterans' benefits for higher education by rendering four years of satisfactory service in the Armed Services (*see, e.g.*, Pl. Exs. 1-3). The "85-15" and "two year" rules arbitrarily and unnecessarily deprive veterans who have no alternative higher education of the type they need available to them of any chance to use the benefits they have earned. This deprivation denies such veterans their right to substantive due process of law.

III.

The Application of the Expanded "85-15" and "Two Year" Rules to the College Likewise Denied Procedural Due Process of Law.

In addition to the substantive constitutional defects set forth above, the denial of procedural due process in the application of the "85-15" and "two year" rules to the College impermissibly trenched upon veterans' constitutional right not to be deprived of property without due process of law.

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* Indeed, Congress directed the Veterans Administration to undertake annual compliance surveys of institutions enrolling 300 or more veterans by Section 512 of Public Law 94-502. *See* S. Rep. No. 94-1243, 94th Cong., 2d Sess. 133 (1976).

This Court has held on numerous occasions that the Federal Government and the States cannot deprive a person of "property" without affording some kind of hearing. *See, e.g., Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976); *Morrissey* v. *Brewer*, 408 U.S. 471, 480-84 (1972); *Goldberg* v. *Kelly*, 397 U.S. 254, 260-66 (1970). Although these opinions have provided for flexibility in the nature and timing of the hearing, *see, e.g., Mathews* v. *Eldridge*, 424 U.S. 319, 333-35 (1976), they have made clear that at some point before the deprivation is made final, a hearing must be held.

These principles are applicable in this case and, when measured against them, the "85-15" and "two year" rules are plainly deficient. Veterans' property rights are clearly at stake. They have at least as substantial an interest in the continued receipt of benefits as did the recipients of disability benefits in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), and of welfare payments in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). Moreover, uncontradicted evidence adduced in the District Court demonstrates the existence of a reasonable expectation of entitlement, *see Board of Regents* v. *Roth*, 408 U.S. 564, 576-78 (1972), since military recruiting efforts stress that potential enlistees can "earn" a subsidized college education by joining the Armed Forces (*see, e.g.*, Pl. Exs. 1-3).*

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* Several earlier opinions of lower courts have ruled that veterans' benefits are "gratuities" and do not create any vested rights in veterans. *See, e.g., De Rodulfa* v. *United States*, 461 F.2d 1240, 1257-58 (D.C. Cir.), *cert. denied*, 409 U.S. 949 (1972); *Milliken* v. *Gleason*, 332 F.2d 122, 123 (1st Cir. 1964), *cert. denied*, 379 U.S. 1002 (1965). These cases, however, are premised upon an analysis of government benefits which has been wholly undermined by *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). Most of these cases predate *Goldberg*. *De Rodulfa*, which postdates *Goldberg*, explicitly relied upon pre-*Goldberg* precedents. *See* 461 F.2d at 1257-58 & n.102.

A complete deprivation of these property rights is threatened by the application of the "85-15" and "two year" rules to many veterans. In the face of the nature of the veterans' interest and the gravity of the threatened deprivations, the procedural deficiencies of the rules applied in this case are manifest. *See Mathews* v. *Eldridge,* 424 U.S. 319, 335 (1976). The veterans who wished to attend the College were afforded no opportunity to challenge the determination of the Veterans Administration that they should not receive veterans' benefits, or to demonstrate that the "85-15" and "two year" rules should be waived, if necessary, to permit them to attend the College.* The absence of *any* procedural safeguards for veterans clearly requires the conclusion that the "85-15" and "two year" rules, as applied in this case, fall short of the requirements established by the due process clause.

The denial of procedural due process in the present case was compounded by the arbitrariness of the standards applied by the Veterans Administration to the College's request for a waiver (*see* p. 7 *supra*). In enacting the extended "85-15" rule, Congress expressly authorized the Veterans Administration to grant waivers from this rule where such waivers are found to be "in the interest of the

* Section 307 of Public Law 95-202 requires that veterans whose benefits are being discontinued or suspended be given written notice and a subsequent statement of reasons and hearing. While this provision would not aid veterans who are denied the opportunity to enroll in a course under the "85-15" and "two year" rules (as opposed to having their benefits discontinued or suspended), it indicates Congressional recognition of the denial of due process implicit in the unavailability of a hearing. Lower court decisions had held that previous Veterans Administration termination procedures denied procedural due process. *Waterman* v. *Roudebush,* No. 4-77-Civ-70 (D. Minn. June 21, 1977); *Devine* v. *Miller,* 4 Mil. L. Rep. 2365 (C.D. Cal. 1976); *cf. Plato* v. *Roudebush,* 397 F. Supp. 1295, 1307-10 (D. Md. 1975).

eligible veteran and the Federal Government." Pub. L. 94-502, § 205(4), 90 Stat. 2387 (1976). This authority was intended to permit the Veterans Administration to exempt from the revised "85-15" rule institutions rendering needed and irreplaceable services, which should be preserved in the interests of veterans and, through them, of the Federal Government. The College, which is fully accredited, with a long history of successful operation, and which is the community's only resource for the type of education in question, is clearly such an institution. The Veterans Administration, however, refused to consider the College's request for a waiver before this action was commenced, and has promulgated regulations which narrowly and arbitrarily circumscribe its willingness to grant exemptions from the "85-15" and "two year" rules and bar any relief if 85% of the course registrants are veterans (*see* p. 7 *supra*). The regulations simply reiterate the discrimination instinct in the statute. This studied refusal to consider on the merits the College's request for a waiver has denied the procedural due process rights of the veterans who wish to attend the College.

IV.

Appellants' Suggestion of a Remand to Consider the Effect of the 1977 Amendments Is Without Merit.

In a Supplemental Memorandum filed in December 1977, appellants advised the Court of the 1977 amendments to the "85-15" and "two year" rules which have been described above (pp. 8-9), and suggested that "it may be appropriate" for the Court to remand the case for consideration of the effect of these amendments upon the College.* Ap-

* Appellants' Supplemental Memorandum further urged that the Court should accompany such a remand with a declaration that the rational basis test of equal protection, rather than any other test, applies to this case. This suggestion is without merit, both because this

pellants do not state that the 1977 amendments would terminate the application of the "85-15" and "two year" rules to the College, or even that appellants intend to give expeditious consideration to the question whether these rules should be applied to the College in light of the 1977 amendments. Most of the College's courses have an enrollment of 85% veterans or more, and therefore would be unaffected by the slight and temporary amelioration of the "85-15" rule in the 1977 amendments. Relief from the "85-15" rule would require a waiver by the Administrator, who had equally broad power before the 1977 amendments and refused to exercise it (*see* p. 8 *supra*).

Since appellants do not give this Court any concrete reason to believe that the 1977 amendments would affect appellants' application of the "85-15" and "two year" rules to the College, appellants' suggestion of a remand should be denied.*

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case merits the application of a more demanding standard of equal protection (*see* pp. 15-18 *supra*) and because appellants' request amounts to a request for an advisory opinion by way of dictum on an abstract question of constitutional law. *See, e.g., Sanks* v. *Georgia*, 401 U.S. 144, 150-53 (1971); *United States* v. *Fruehauf*, 365 U.S. 146, 157 (1961); *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568-75, 584-85 (1947).

* If the Court should determine to remand this case, it should leave the judgment of the District Court in effect so as to maintain the *status quo* and to prevent the irreparable injury to the College which the District Court found would otherwise occur (J.S. App. 15-17).

CONCLUSION

For the reasons given above, the judgment of the United States District Court for the District of South Dakota entered on June 24, 1977 should be affirmed or, in the alternative, the appeal should be dismissed.

Dated: January 18, 1978

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-716

MAX CLELAND, ADMINISTRATOR OF THE VETERANS ADMINISTRATION, ET AL.,

Appellants,

v.

NATIONAL COLLEGE OF BUSINESS,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA

BRIEF OF THE ASSOCIATION OF INDEPENDENT COLLEGES AND SCHOOLS *AMICUS CURIAE*

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OPINION BELOW

The opinion of the District Court is reported at 433 F.Supp. 605 and is reprinted at Appendix A to the Jurisdictional Statement of the Appellants.

JURISDICTION

Jurisdiction is conferred on this Court by 28 U.S.C. § 1252.

QUESTION PRESENTED

Whether 38 U.S.C. § 1673(d) and § 1789, as amended, which provide, with some exceptions, that the Administrator of the Veterans Administration, in reviewing applications for educational benefits, shall not approve a veteran's enrollment in courses that have been in operation for less than two years or in which more than 85 percent of the enrolled students receive either federal tuition assistance or assistance from the school itself, are consistent with the Due Process Clause of the Fifth Amendment or the First Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of * * * property, without due process of law.

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for redress of grievances.

The relevant provisions of 38 U.S.C. (Supp. V) § 1673(d), as amended by Section 205 of Pub. L. 94-502, 90 Stat. 2387 ("85-15" rule) and of 38 U.S.C. (Supp. V) § 1789, as amended by Section 509 of Pub. L. 94-502, 90 Stat. 2401 ("Two Year" rule) are set forth in Appendix D of the Jurisdictional Statement of the Appellants.

CONSENT TO FILE

This Amicus Curiae brief is being filed with the consent of all parties to the proceeding.[1]

INTEREST OF THE AMICUS CURIAE

The Association of Independent Colleges and Schools ("AICS"), a non-profit educational association incorporated under the laws of the District of Columbia, is a membership organization consisting of, *inter alia*, post-secondary non-public educational institutions predominantly organized to offer resident programs including study in the field of business and office occupations. AICS has been in existence for over 50 years and, at present, consists of approximately 500 such institutions, including the National College of Business, located throughout 49 states and the District of Columbia. Many AICS institutions, including the National College of Business, fall within the definition of "institution of higher learning" (38 U.S.C. §§1652(f), 1701(a)(10)), and offer a "program of education" (38 U.S.C. §§ 1652(b), 1701(a)(5)), leading to a "standard college degree" (38 U.S.C. §§1652(5), 1701(1)(11)). Graduates of AICS institutions are employed in the entire spectrum of the American economy, including positions in business and government. The emphasis in education at AICS institutions is training for careers in business, industry and government, including such diverse fields as secretarial, computer programming, accountancy and management of many types.

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[1] Letters of consent on behalf of all parties to the case have been filed with the Clerk of the Court.

AICS is committed in its By-Laws to the establishment and advancement of sound educational and ethical standards in the field of education in and among independent schools and colleges; and to cooperation with other agencies and organizations interested in the field of education on behalf of member institutions, the common standard of which is the independent governance of these non-public institutions without direct reliance upon tax receipts for operations in the post-secondary and collegiate area; and to cooperation with federal, state and local educational institutions and authorities in the maintenance of high standards and sound policies in the educational field. All of the member institutions of AICS are predominantly organized in such a manner that they have a curriculum designed to prepare people for careers in business.

Many of the institutions which are members of AICS enroll students who are eligible to receive educational benefits under Chapters 34, 35 and 36 of Title 38 of the United States Code. In the case of 38 U.S.C. (Supp. V) § 1673(d) as amended by Section 205 of Pub. L. 94-502, 90 Stat. 2387 the institutional members of AICS are precluded from enrolling more than a certain percentage of veteran students and other students who are recipients of federal assistance grants. The decision of the Veterans Administration to refuse to approve, for purposes of VA benefits, the enrollment of certain veteran students in the National College of Business due to 38 U.S.C. (Supp. V) § 1673(d), as amended by Section 205 of Pub. L. 94-502, 90 Stat. 2387 ("85-15" rule) has immediate adverse implications for the veteran students at AICS institutions and for the programs of instruction offered by these institutions. In the case of 38 U.S.C. (Supp. V) § 1789, as amended by Section 509 of Pub. L. 94-502, 90 Stat. 2401 ("Two Year" rule) the institutional

members of AICS are effectively precluded from enrolling veteran students in many courses which have been in operation for less than two years, thereby creating immediate adverse implications for the programs of instruction at AICS institutions as well as for the students, veteran and non-veteran, who attend such institutions.

The Court's decision in this case will have a profound and wide-reaching effect on the programs of instruction offered at AICS institutions throughout the nation. Further the Court's decision will have a significant and long-range impact on the character of students attending AICS institutions.

Consistent with its national perspective, the Amicus Curiae will leave the particular facts of the case to the briefs of the parties and will concentrate its attention on discussing the significant issues present in this case which affect institutions of higher learning, including the members of AICS.

ARGUMENT

AICS contends that the "85-15" rule and the "Two Year" rule violate both the rational basis test of Due Process as well as the higher or medium level of review set forth in such cases as *Trimble v. Gordon*, 430 U.S. 762 (1977). Further AICS contends that the "85-15" rule and the "Two Year" rule violate First Amendment rights to freedom of expression and association.

I.

THE "85-15" RULE AND THE "TWO YEAR" RULE VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

A. The Due Process Clause of the Fifth Amendment.

AICS submits that the "85-15" rule and the "Two Year" rule violate the Due Process Clause of the Fifth Amendment to the United States Constitution. Before discussing the specifics of these rules, it is necessary to consider the constitutional requirements of the Due Process Clause.[2]

Although the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable so as to be violative of due process. *Schlesinger v. Ballard*, 419 U.S. 498, *rehearing denied*, 420 U.S. 966 (1975); *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); *Schneider v. Rusk*, 377 U.S. 163 (1964); *Bolling v. Sharpe*, 347 U.S. 497 (1954). If a classification would be invalid under the Equal Protection Clause of the Fourteenth Amendment, it is also inconsistent with the due process requirement of the Fifth Amendment. *Johnson v. Robison*, 415 U.S. 361, 364, n. 4 (1974); *Richardson v. Belcher*, 414 U.S. 78, 81 (1971).

There are a number of tests applicable to a determination of whether a statute comports with the requirements

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[2] Veterans have a sufficient interest in the receipt of veterans' benefits to be protected by the Due Process Clause from arbitrary government action withdrawing or modifying VA benefits. *DeRodulfa v. United States*, 461 F.2d 1240 (D.C. Cir.) *cert. denied*, 409 U.S. 949 (1972); *Plato v. Roudebush*, 397 F.Supp. 1295 (D. Md. 1975); *Fielder v. Cleland*, 433 F.Supp. 115 (E.D. Mich. 1977).

of equal protection and due process. The traditional rational basis analysis is set forth in *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920):

> . . . the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

Hampton v. Mow Sun Wong, 426 U.S. 88 (1976); *Schlesinger v. Ballard, supra; Vlandis v. Kline*, 412 U.S. 411 (1973); *Flemming v. Nestor*, 363 U.S. 603, 611 (1960).

A stricter medium level of review has recently been set forth in *Trimble v. Gordon*, 430 U.S. 762, 766-67 (1977):

> [this] Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose . . . . In this context, the standard just stated is a minimum; the Court sometimes requires more. Though the latitude given state economic and social regulation is necessarily broad, when the state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny.

The so-called strict scrutiny analysis requires much more than a showing of a rational basis to pass constitutional muster. Rather, legislation can be sustained only where it is shown to be necessary to promote a compelling governmental interest. To trigger the application of the strict scrutiny test, the legislation at issue must effect a suspect classification or act upon a fundamental right. *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Robison v. Johnson*, 312 F.Supp. 848 (D. Mass. 1973). When the strict scrutiny test applies, legislation

rarely passes constitutional muster. *Robison v. Johnson*, *supra* at 854.

The medium level of review has not been confined only to cases of gender and legitimacy classifications. In *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), this Court invalidated a statute denying food stamp benefits to households containing one or more persons unrelated to the members of the household by invoking a medium level of review. This Court stated that even if households containing unrelated persons posed a greater threat of abuses, Congress was required to employ more delicate tools to detect potential abuses. *See* 413 U.S. at 536-37. *See also, Jiminez v. Weinberger*, 417 U.S. 628, 636-37 (1974); *United States Department of Agriculture v. Murray*, 413 U.S. 508 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

AICS submits that the medium level of review is clearly justified in this case. As the District Court noted in its opinion:

> . . . VA educational benefits can make the difference between a higher education that imparts marketable skills and no training for any sort of permanent occupation. In today's specialized society, higher education or training . . . is certainly essential to employment which will adequately support an individual and his or her family. 433 F.Supp. at 619.

Although education itself has not been found to be a fundamental constitutional right, it has been found to be both vital and important to our society. *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973); *Wisconsin v. Yoder*, 405 U.S. 205, 213, 237-39 (1972); *Abington School Dist. v. Schenpp*, 374 U.S. 203, 230 (1963): *Brown v. Board of Education*, 347 U.S. 483 (1954); *McCollom v. Board of Education*, 333 U.S. 203,

212 *et seq.* (1948); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

For the reasons set forth *infra*, AICS submits that neither the "85-15" rule nor the "Two Year" rule can survive scrutiny under the medium level of review. In order to determine whether the "85-15" rule or the "Two Year" rule meet the rational basis test, it is necessary to find the purpose of the statute, examine the nature of the classification effected, and to consider the rational nexus, if any, between the two. If there is no rational nexus, then the statute of necessity must fall on the ground of unconstitutionality.

B. Statutory Purpose of the "85-15" Rule and the "Two Year" Rule.

Chapter 34 of Title 38, United States Code, concerning veterans' educational assistance, contains its own statement of purpose. 38 U.S.C. § 1651 provides as follows:

> The Congress of the United States hereby declares that the education program created by this chapter is for the purpose of (1) enhancing and making more attractive service in the Armed Forces of the United States, (2) extending the benefits of a higher education to qualified and deserving young persons who might not otherwise be able to afford such an education, (3) providing vocational readjustment and restoring lost educational opportunities to those service men and women whose careers have been interrupted or impeded by reason of active duty after January 31, 1955, and (4) aiding such persons in attaining the vocational and educational status which they might normally have aspired to and obtained had they not served their country.

This Court, in construing 38 U.S.C. § 1651, has held that the aim of this statute is to assist those who served on active duty in the Armed Forces to readjust to civilian

life. *Johnson v. Robison, supra* at 377. It is noteworthy that neither 38 U.S.C. § 1651 nor *Johnson v. Robison, supra,* suggests that the aforementioned statement of Congressional purpose was in any way related to other educational assistance programs administered by the federal government. Rather, the whole thrust of the statutory purpose is directed toward aiding veterans by expanding their range of educational opportunities after leaving the service, in order to ease the readjustment to civilian life.

C. Legislative History and Analysis of the "85-15" Rule.

The legislative history of 38 U.S.C. (Supp. V) § 1673(d) as amended by Section 205 of Pub. L. 94-502, 90 Stat. 2387 commences with the first version of the 85-15 rule, which was enacted on July 16, 1952. 38 U.S.C. § 931 (1952) provided as follows:

> The Administrator shall not approve the enrollment of any eligible veteran, not already enrolled, in any nonaccredited course below the college level offered by a proprietary profit or proprietary nonprofit educational institution for any period during which the Administrator finds that more than eighty-five percentum of the students enrolled in the course are having all or any part of their tuition fees or their charges paid to and for them by the educational institution or the Veterans' Administration . . . .

The impetus for this provision developed as a result of the work of a House of Representatives Select Committee, chaired by Representative Teague, to investigate the educational program under the GI Bill. See H.R. Rep. No. 1375, 82nd Cong., 2d Sess. (1952). This Committee concluded that, concerning proprietary profit schools below the college level, there had been a rapid uncontrolled expansion of private profit schools during the first several years of veterans training programs, and that many of these schools were without educational background, expensive, and offered training of doubtful quality. The Committee also noted that exploitation by private schools had been widespread, including falsification of cost data, falsification of attendance records, overcharges for supplies, improper billings, and unethical influence of VA and state officials. The Committee noted that criminal practices had been widespread in this class of school. (H.R. Rep. No. 1375, 82nd Cong., 2d Sess. 3-4 (1952)).

By contrast, the Committee had no significant findings of abuses in connection with the college level educational assistance program:

> The veterans training program at the college level, although experiencing some administrative difficulties, has been carried out successfully. Participating colleges and universities have rendered outstanding service in training veterans under many adverse conditions.

H.R. Rep. No. 1375, 82nd Cong., 2d Sess. 4 (1952). The Committee returned to this subject in a later phase of its report:

> The veterans' training program at the college level has enjoyed more harmony and success than any other phase of the program. Those veterans attending established, accredited colleges and universities who pursued their courses with sincerity received the best training available in this country . . . . Considered as a whole, there is little question that better training was received at the college level for less money than in any other phase of the veterans' training program. H.R. Rep. No. 1375, 82nd Cong., 2d Sess., 221 (1952).

H.R. Rep. No. 1943, 82nd Cong., 2d Sess. (1952), which accompanied H.R. 7656,[3] noted that the 85-15 requirement[4]

> . . . is believed to be a real safeguard to assure sound training for the veteran, at reasonable cost, by seasoned institutions. Had such a requirement been in effect during the life of the so-called "GI bill of rights," there is little doubt that considerable savings would have resulted and that much better training would have been realized in many areas.

The VA supported the 85-15 requirement on the following grounds:

> One of the most instructive safeguards against unsound training in institutions interested only in exploiting the program for commercial gain is the provision that the Administrator shall not approve the enrollment of any eligible veteran, not already enrolled, in any nonaccredited courses below the college level offered by a proprietary profit or proprietary nonprofit educational institution for any period in which the Administrator finds more than three-fourths of the students enrolled in the course are having all or any part of their tuition, fees, or other charges paid to or for them by the institution or by the Veterans' Administration. Stated another way, this means that institutional courses of the specified character in proprietary institutions could not qualify for new enrollments under this proposal unless at least one-fourth of

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[3]When passed in final form, this legislation became Pub. L. 550, 66 Stat. 667 (July 16, 1952). The 85-15 requirement was codified at 38 U.S.C. § 931 (1952). The requirement is found in § 226 of Pub. L. 550.

[4]In the 1952 bill as drafted, however, it was a 75-25 requirement.

> those enrolled in the course are meeting the tuition and other institutional charges out of their own pockets or through assistance provided from sources other than the Veterans' Administration or the institution. The term 'nonaccredited courses' is not specifically defined in this section of the bill, but apparently contemplates, in general, the class of courses, approvable in accordance with the detailed standards provided by Section 254 of the bill, except that it would not apply to other than proprietary institutions. H.R. Rep. No. 1943, 82nd Cong., 2d Sess. 197 (1952).

Hence, it seems clear that at the time the original 85-15 requirement was promulgated, Congress was concerned with abuses in veterans' educational assistance in proprietary profit schools below the college level. In the area of college level education, the Teague Committee in its report (H.R. Rep. No. 1375, 82nd Cong., 2d Sess. (1952)) specifically found that college level aid was being used successfully and without notable abuse. The Congress' expressed concern was to provide sound training for veterans.

In 1958, 38 U.S.C. § 931 was recodified at 38 U.S.C. § 1623(c) with minor modifications. Pub. L. 85-857, 72 Stat. 1178 (September 1, 1958). The direct predecessor of the present law was enacted in 1966 as part of the Veterans' Readjustment Benefits Act of 1966. Pub. L. 89-358, 80 Stat. 12. H.R. Rep. No. 1258, 89th Cong., 2d Sess. (1966) (to accompany H.R. 12410) indicated that the 85-15 rule was carried forward from a similar provision applicable to the Korean GI education and training program. H.R. Rep. No. 1258, 89th Cong., 2d Sess. (1966). S. Rep. No. 269, 89th Cong., 2d Sess. 31, 48 (1966) (to accompany S. 9) contains similar references to the Korean GI program. The Senate report also

characterized the 85-15 rule as a protection against unsound training. S. Rep. No. 269, 89th Cong., 2d Sess. 31 (1966). The Senate report also noted that the 85-15 rule was designed to afford assurance that nonaccredited courses below the college level must prove themselves by attracting nonveteran students who were willing to pay their own money for the instruction furnished. Hence, in 1966, the Congress again was exclusively concerned about the soundness of training for veterans. Other federal educational assistance programs, which now amount to approximately $3.3 billion, were just beginning at that time: no reference was made to these other programs in the 1966 law. Also, most significantly, it was still assumed in 1966 that potential abuses were of concern in nonaccredited courses below the college level. Pub. L. 89-358, 80 Stat. 12 (1966).

Three major changes occurred in the scope, character and computation of the 85-15 rule in 1976 in the Veterans' Educational Employment Assistance Act of 1976, Pub. L. 94-502, 90 Stat. 2387. [5] By one change in the law the 85-15 requirement was made applicable to courses leading to a standard college degree. The second change in the rule was in the computational formula: within the 85 percentum figure were to be included, for the first time, along with veteran entitlements, recipients of other federal educational grants which are discretionary in nature. Thirdly, a new provision was included

[5] Between 1966 and 1976 there had been a number of minor changes in 38 U.S.C. § 1673(d). None of these changes, however, altered the basic structure of the rule as set forth in 1966. *See* Pub. L. 90-77, 81 Stat. 185 (1967); Pub. L. 91-219, 84 Stat. 78 (1970); Pub. L. 92-540, 86 Stat. 1090 (1972); Pub. L. 93-508, 88 Stat. 1582 (1974). None of these changes made any reference to non-VA federal educational assistance programs nor did they make the rule applicable to courses leading to a college degree.

allowing the VA Administrator discretion to waive the requirements of the 85-15 rule " . . . in whole or in part, if the Administrator determines it to be in the interest of eligible veterans and the Federal Government."

The legislative history does not explain the reasons for these changes, nor does it explain in what manner the new rule was to effectuate the purposes of the legislation. S. Rep. No. 94-1243, 94th Cong., 2d Sess. (1976) which accompanied S. 969, sets out the major legislative history of the new 85-15 rule. As to program abuse, the Senate report noted that the Senate Veterans Affairs Committee had examined, *inter alia*, a General Accounting Office report, "Educational Assistance Overpayments, a Billion Dollar Problem—A Look at the Causes, Solutions, and Collection Efforts." [6] (March 19, 1976). Nowhere in the GAO study is there any reference to the 85-15 rule as an appropriate means to remedy the overpayment of benefits problem. Rather, the GAO recommended a series of steps designed to strengthen the administration of the benefit programs by the VA. There is also no suggestion in the GAO report that VA overpayments and abuses of VA benefits have any connection with other federal educational assistance programs.

The most explicit statement of purpose behind the expanded 85-15 rule contained in Pub. L. 94-502 is contained in S. Rep. No. 94-1243, 94th Cong., 2d Sess. 50 (1976):

[6] This report is reprinted in *Hearings on Overpayments and Enforcement of Standards in the Veterans' Education Program*, 94th Cong., 2d Sess. 1735-1799 (1976). The Senate Report also referenced an investigative series on postsecondary education appearing in the Chicago Tribune. This series did not deal with institutions of higher learning, such as the National College of Business, or programs of education leading to a standard college degree. Rather this series dealt with student consumer abuse in trade and barber schools.

Other amendments in the reported bill which are intended to reduce the possibility or extent of abuse include first, extension and expansion of the 85-15 rule to all institutions enrolling veterans; and second, the deletion of existing statutory exceptions to the statutory requirement of 2 years of operation prior to VA approval of enrollment of veterans. Under the reported bill, the 2 year rule would apply to certain branches or extensions of institutions. In both of these situations, the reported provisions are intended to allow the free market mechanism to prove the worth of the course offered, by requiring that it respond to the general dictates of an open market as well as to those with available Federal moneys to spend. In the first instance at least 15 percent of the enrolled students must not be in receipt of VA payments or other Federal grants.

See also S. Rep. No. 94-1243, 94th Cong., 2d Sess. 88-89 (1976). The Committee report thus states that the expanded 85-15 rule is designed to reduce potential as well as actual abuse as well as to provide an opportunity for the free market mechanism to prove the worth of the particular course offered.

The Senate Committee report does address itself briefly to one of the significant changes in the 85-15 requirement, by which the rule is imposed on all courses attended by veterans including those courses leading to a standard college degree. The report notes that the rationale for the .pplication of the 85-15 rule should be "logically" extended to courses other than just those not leading to a standard college degree. The report expresses concern about limiting those situations in which substantial abuse could occur. S. Rep. No. 94-1243, 94th Cong., 2d Sess. 88-89 (1976). The aforementioned GAO report, however, made no findings or recommendations that the

85-15 rule would be either necessary or helpful in preventing abuse and/or overpayment of veterans benefits. There is no explanation in the report of why the 85-15 rule should be "logically" extended to courses leading to a standard college degree.

The Senate report also fails to explain why the nature of the formula for the 85-15 computation is significantly altered by Pub. L. 94-502 by the inclusion of recipients of other federal educational grants as part of the 85 percent figure. The Senate report notes as follows on this matter:

> In addition, in computing the 85-15 requirement, the amendment would require the inclusion of not only those students subsidized by the Veterans' Administration, but also those students in receipt of grants from other federal agencies. The Committee believes the inclusion of other students receiving federal grants is consistent with the general intent and rationale of section 1673(d) as previously discussed. This would include Federal grants such as basic educational opportunity grants (BEOG) and supplemental educational opportunity grants (SEOG) made by the Department of Health, Education and Welfare . . . .

S. Rep. No. 94-1243, 94th Cong., 2d Sess. 89 (1976). There is, however, nothing about the inclusion of BEOG and SEOG recipients within the inclusion of the 85 percent figure which is consistent with the rationale or the history of 38 U.S.C. § 1673(d), which had previously only concerned veterans. None of the legislative history of this provision demonstrates any connexity between veterans educational entitlement grants and other federal educational discretionary grants from the standpoint of so-called abuses in the veterans educational programs.

Although the Senate Report suggests that one of the reasons for expanding the coverage of the 85-15 rule was to avoid potential abuses concerning educational benefits for veterans, the report noted that the VA was unable to estimate the cost impact of the extension of the 85-15 rule. S. Rep. No. 94-1243, 94th Cong., 2d Sess. 90, 176 (1976).

The legislative history concerning Pub. L. 94-502 suggests two interrelated purposes behind the expanded 85-15 rule. The major purpose was to prevent abuses of programs dealing with veterans educational assistance. The supposed means by which this would be accomplished was as a result of the so-called market value test: if a course could attract 15% or more nonfederal aid recipients, the course would presumably be proven sound and appropriate for veterans to attend and receive VA assistance.[7] AICS submits that the purposes set forth in 38 U.S.C. § 1651 (1970) and the purposes derived from the legislative history behind 38 U.S.C. (Supp. V) § 1673(d) as amended by Section 205 of Pub. L. 94-502, 90 Stat. 2387 do not on analysis justify the distinctions

[7] As noted previously in this brief, there is very little, if any, support in the legislative record to conclude that there has been a significant abuse (as distinguished from the internal administrative problems of the VA resulting in overpayments of benefits) of VA educational assistance programs at the college level. The original 85-15 rule did not apply to college level courses because of a specific legislative finding that VA programs at the college level worked well with minimal problems. H.R. Rep. No. 1375, 82nd Cong., 2d Sess. 4, 221 (1952). The GAO report, "Educational Assistance Overpayments, a Billion Dollar Problem—A Look at the Causes, Solutions, and Collection Efforts" (March 19, 1976), nowhere recommends that the 85-15 rule is needed to deal with the overpayments problem. Nor does that report point to the absence of the 85-15 rule for the courses leading to a standard college degree as a cause of the overpayments problem.

made in the statute and that the statute thus violates the Due Process Clause of the Fifth Amendment.

The 85-15 rule requires that the VA Administrator shall not approve the enrollment of any veteran, not already enrolled, in any course for any period during which more than 85 percent of the students in the course are having their tuition, fees or other charges paid to or for them by the educational institutions, the VA or any other federal agency. The rule also provides that the VA Administrator may waive the requirements of the rule if the Administrator determines it to be in the interest of the eligible veteran and the Federal Government.

A number of classifications are made in this statute, two of which are crucial from the standpoint of constitutional review. First, the statute establishes two categories of veterans, new and old enrollees. Those veterans who enrolled in a course before the course had more than 85 percent enrollment by veterans and other recipients of federal grants and recipients of institutional aid ("old enrollees") do not lose their benefits. The new veteran enrollees however are not allowed to enroll in a course with more than 85 percent (from the VA, other federal agencies and the institution) recipients and obtain VA benefits. Also, the statute distinguishes between veterans and other recipients of federal grants. It is only the veterans who will lose the opportunity to obtain benefits should the enrollment in a course exceed 85 percent veterans, other federal grant recipients and institutional grant recipients. Hence, the veteran stands in a less favored position than other recipients of other federal educational assistance from the standpoint of the courses he may take and continue to receive financial assistance. There is also a distinction between the recipients of educational assistance (veterans, other fed-

eral grant recipients, institutional aid recipients) and the paying students, which underlies the 85-15 formula. If the paying students fall below 15 percent in any course, then new veteran enrollees cannot enroll in the course and obtain VA benefits.[8]

AICS submits that there is no rational nexus between the statutory classification between veterans and other recipients of federal aid and the statutory purposes as is explicitly set forth in 38 U.S.C. § 1651, which is set forth *supra*. Certainly there can be no reason to distinguish between new and old veteran course enrollees in order to assist veterans in readjusting to civilian life. That goal is effectuated by treating all veterans as a single class. Nor is there any reason to put veterans in a less favored position than other recipients of federal educational grants. Rather 38 U.S.C. § 1651 would appear to mandate that veterans be treated at least as well as other federal educational grantees.

AICS also submits that there is no rational nexus between the purposes of the statute derived from the legislative history and the aforementioned classifications established in 38 U.S.C. (Supp. V) § 1673(d) as amended by Section 205 of Pub. L. 94-502, 90 Stat. 2387.[9]

[8] Of course, the concept of the paying student is somewhat of a misnomer since many of these students are also receiving financial aid in the form of loans. The federal government now guarantees approximately $6 billion of student loans. It is also interesting to note that the percentage of paying students *and* the percentage of non-VA federal educational grantees are matters over which the veteran has no control.

[9] Although the legislative history of a statute is undoubtedly a pertinent subject for review in order to determine the purpose of a statute when a constitutional issue is raised, it seems clear that where there is a legislatively enacted statement of Congressional purpose, as here, that provision should be given more significance in connection with statutory purpose than committee reports and other indicia of legislative history.

There seems no reason to distinguish between new and old veteran course enrollees as a means to cure abuses of VA benefits. The timing of enrollment is, logically, a fortuitous event without any relation to whether or not VA benefits will be abused. Certainly, there is nothing in the legislative history to suggest otherwise.

Nor is there any reason to distinguish between veterans and other recipients of federal educational grants in order to avoid potential abuses in the award of VA benefits. There is nothing in the legislative history to suggest any relation between other federal educational grant programs, discretionary in nature, and potential abuses in educational assistance for veterans. Nor does logic dictate or even suggest that there would be such a connection.

The "free market" theory also does not support any of the statutory distinctions. The free market theory suggests that unless 15 percent of the students in the course are willing to provide their own money to attend a course, there is a significant risk that the course is not sound or that VA benefits would be otherwise exploited or abused. The free market theory as a justification for the 85-15 rule developed prior to the expansion of the rule to college level courses. *See* S. Rep. No. 269, 89th Cong., 2d Sess. 31 (1966). There is no analysis in the 1976 legislative history concerning the viability of this concept to colleges where frequently large portions of the student body are receiving financial aid from a variety of sources.[10] In any event, the free market theory does not logically justify treating veterans less well than other

[10] Many students are the recipients of guaranteed student loans, as noted in footnote 8, *supra*. However, these students are considered to be within the 15 percent category of "paying" students for purposes of the 85-15 rule.

recipients of federal educational assistance in order to avoid potential abuses in VA educational programs.

As the classifications set forth in the "85-15" rule do not bear a rational relationship to the purposes behind the statute, AICS submits that the statute is constitutionally invalid under the Due Process Clause of the Fifth Amendment. *See Hampton v. Mow Sun Wong, supra; Schlesinger v. Ballard, supra; Vlandis v. Kline, supra; Flemming v. Nestor, supra; Royster Guano Co. v. Virginia, supra.*

AICS also submits that 38 U.S.C. (Supp. V) § 1673(d), as amended by Section 205 of Pub. L. 94-502, 90 Stat. 2387 violates the Due Process Clause for another reason. There is no rational basis for including within the 85 percent computation recipients of veterans' educational aid and recipients of other federal educational grant programs, which are of a different character and purpose than veterans' educational grants. One test of rational basis would be whether the inclusion of non-veteran educational grants bears any connection to the problem of abuse of VA educational benefits. There is nothing in logic or legislative history or the very nature of the two types of grants to support the conclusion that there is such a connection.

AICS also believes that the statute as presently applied does not provide procedural due process to veteran students. Under 38 U.S.C. (Supp. V) § 1673(d), as amended by Section 205 of Pub. L. 94-502, 90 Stat. 2387, the Administrator is given authority to waive the requirements of the statute if he determines it to be in the interest of the eligible veteran. AICS thus submits that the VA's administration of 38 U.S.C. § 1673(d) and in particular its failure to provide any administrative

procedure for an individual veteran to request a waiver does not comport with procedural due process. *See Matthews v. Eldridge,* 424 U.S. 319, 332 (1976); *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972).

Computations pursuant to the 85-15 rule apparently are not determined until *after* course enrollments and/or admissions have been completed—hence precluding a veteran from receiving any notice in advance as to whether he will receive VA benefits in connection with attendance in a particular course. For instance, when a veteran is admitted to college in early Spring, he doesn't know whether there will be a waiver of any of the requirements of the statute, which is determined in July, and he doesn't know the total number of veteran and non-veteran federal educational grantees in the course. The inevitable result is to cause veterans to stay away from enrollment at schools where there may be a significant chance that they will be unable to obtain VA benefits in connection with their education. At the same time the "85-15" rule in no way affects the eligibility of students for BEOG and SEOG grants. These procedures thus further reflect the denial of due process inflicted by the 85-15 rule. They also reflect an interference with the First Amendment freedom of association, described *infra.*

D. Legislative History and Analysis of the "Two Year" Rule.

The forerunner of the "Two Year" rule was first enacted in 1949. Pub. L. 81-266, 23 Stat. 653. That statute prohibited payments to institutions that had been in operation for less than one year. Public and other tax-supported schools were exempted from this rule by Pub. L. 81-610, 64 Stat. 337. The original version of the rule also exempted degree-granting institutions. Section

227 of the Korean Conflict GI Bill, Pub. L. 82-550, 66 Stat. 667, extended the requirement to two years. For the first time in the history of the two-year rule, Pub. L. 94-502 included a provision, 38 U.S.C. § 1789(c), excluding from the exemptions to the rule courses offered at a branch or extension of a proprietary profit or non-profit educational institution if the branch was located outside the normal commuting distance of the parent institution. Subsection (c) of 38 U.S.C. § 1789 is a limitation on the exceptions contained in subsection (b) to the prohibition contained in subsection (a) of 38 U.S.C. § 1789.

The "Two Year" rule, like the "85-15" rule effects a discrimination between veterans and all other persons receiving Federal educational assistance. The "Two Year" rule applies only to veterans, permitting non-veterans to use Federal educational grants to attend institutions which do not comply with this rule. It is noteworthy that almost 50% of Federal educational benefits are now paid to non-veterans and that Federal educational benefit programs now aid more non-veterans than veterans. S. Rep. No. 94-1243, 94th Cong., 2d Sess. 89 (1976). This discrimination against veterans has no basis in the purpose of the rule as set forth in 38 U.S.C. § 1651. Nor can it be said that the "Two Year" rule has the effect of assuring educational quality since it is only veterans benefits, as opposed to all other Federal educational benefits, which are the subject of this rule. Hence AICS submits that the "Two Year" rule is also without rational basis and must be held to conflict with the Due Process Clause of the Fifth Amendment.

38 U.S.C. (Supp. V) § 1789(c), as amended by Section 509 of Pub. L. 94-502, 90 Stat. 2401, effects a distinction between private and public institutions of

higher learning. Under the amended law, a private institution of higher learning is precluded from having branches at locations beyond the normal commuting distance of the institution. A similarly situated public institution, however, may maintain a branch throughout the entire area of its taxing jurisdiction. This distinction between public and private institutions bears no relation to the purpose of veterans educational assistance as set forth in 38 U.S.C. § 1651 nor does this distinction make any logical sense. This discrimination has a particularly harsh impact on private institutions like the National College of Business, which is located in an area of the country which is sparsely populated. For this additional reason, AICS submits that the "Two Year" rule cannot survive constitutional review.

II.

THE "85-15" AND THE "TWO YEAR" RULES VIOLATE FIRST AMENDMENT RIGHTS TO FREEDOM OF EXPRESSION AND ASSOCIATION.[11]

As noted previously, the "85-15" rule and the "Two Year" rule act generally to preclude veteran students from receiving veteran educational benefits if they enroll in courses where more than 85 percent of the then existing enrollment consists of veterans, other federal grant recipients and institutional aid recipients or if they enroll in courses which have been in existence for less than two years. Hence, the veteran student is actively discouraged by these statutory rules from attending certain courses which may represent his own free choice of activity. AICS submits that these statutory rules

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[11] Although the District Court did not specifically reach this issue, this Court may affirm the judgment below on these grounds as well as upon the grounds relied upon by the District Court. *See, e.g., California Bankers Ass'n v. Schultz*, 416 U.S. 21, 71 (1974).

therefore limit a veteran student's right to freely associate with other students and educators in the educational context of his choice and also thereby limit such a student's right to express himself.

Students and teachers do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506 (1969). The vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools. *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

Although education itself has not been found to be a fundamental constitutional right, it has been found to be both vital and important to our society. *San Antonio School District v. Rodriguez, supra; Wisconsin v. Yoder, supra; Abington School Dist. v. Schenpp, supra; Brown v. Board of Education, supra; McCollom v. Board of Education, supra; Pierce v. Society of Sisters, supra; Meyer v. Nebraska, supra.*

Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the right of association is not explicitly set out in the First Amendment, it has long been held implicit in the freedom of speech, assembly and petition. *Healy v. James*, 408 U.S. 169 (1972); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *NAACP v. Button*, 371 U.S. 415 (1963); *NAACP v. Alabama*, 357 U.S. 440 (1968). The right of association extends, *inter alia*, to the freedom to associate for the advancement of political or governmental beliefs and ideas, *Bates v. Little Rock*, 361 U.S. 516 (1960);[12] *Sweezy v. New Hampshire, supra*; the freedom to associate for the assertion of material economic or legal interests, *Brotherhood of RR Trainmen v. Virginia*, 377 U.S. 1, *rehearing denied*, 377 U.S. 960 (1964); *NAACP v. Button*, 371 U.S. 415 (1953); *see Griswold v. Connecticut*, 381 U.S. 479 (1965); and the freedom to associate for social purposes, *Evans v. Newton*, 382 U.S. 296 (1966); *Griswold v. Connecticut, supra.* The right to freedom of association is not absolute, but a substantial state interest must be shown in order to justify interference with freedom of association. *NAACP v. Alabama, supra.*

AICS contends that the "85-15" rule and the "Two Year" rule exert a chilling effect on a veteran's right to freedom of association. Although these statutory rules do not by their specific terms preclude veterans from enrolling in certain courses, they actively discourage veterans from doing so by depriving them of educational assistance benefits which they would otherwise receive. The effect of these rules in discouraging attendance in certain courses is thus quite direct. Nor is the effect of these rules only on veteran students. Educational institutions, mindful of veteran enrollment patterns, will consider course structures with an eye to the impact of these statutory rules, thus intruding the government into the educational process.

If a person has the right to associate for social purposes, for economic or legal purposes and for political purposes, it follows that a person has the right to associate with others for educational purposes, especially

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[12] In *Bates*, the Supreme Court noted that the freedom of association was protected not only from heavy-handed frontal attack but from more subtle government interference as well. *Bates v. Little Rock, supra* at 523.

in view of the oft-stated importance of education to our society. Education is also by its very nature inextricably intertwined with expression, speech, and the exchange of ideas, which are at the core of First Amendment values. To interfere with one's ability to participate in the educational process is to interfere with one's right to express himself in a context of his choosing.

AICS also submits that there is no substantial or compelling interest to justify the interference with First Amendment values, which is caused by the "85-15" rule and the "Two Year" rule. A compelling interest analysis appears to be similar to a strict scrutiny analysis for purposes of Due Process review. As noted *supra*, statutes subject to this review rarely pass constitutional muster and AICS submits that neither the "85-15" rule nor the "Two Year" rule can survive a strict scrutiny review. Thus, AICS submits that there is no compelling interest to support either the "85-15" rule or the "Two Year" rule and that these rules therefore are in violation of the First Amendment.[13]

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[13] One must also wonder what compelling interest can support a statute when the statute by its own terms gives the VA Administrator discretion to waive the requirements of the statute entirely.

CONCLUSION

For the aforementioned reasons, the judgment of the United States District Court for the District of South Dakota should be affirmed or, in the alternative, the appeal should be dismissed.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1977

No. 77-716

MAX CLELAND, ADMINISTRATOR OF THE VETERANS ADMINISTRATION, ET AL., APPELLANTS

v.

NATIONAL COLLEGE OF BUSINESS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA

BRIEF AMICUS CURIAE OF AMERICAN ASSOCIATION OF PRESIDENTS OF INDEPENDENT COLLEGES AND UNIVERSITIES IN SUPPORT OF APPELLEE'S MOTION TO AFFIRM

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No. 77-716

MAX CLELAND, ADMINISTRATOR OF THE VETERANS ADMINISTRATION, ET AL., APPELLANTS

v.

NATIONAL COLLEGE OF BUSINESS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA

Consent for Filing

The American Association of Presidents of Independent Colleges and Universities (Association) is a non-profit organization composed of over 100 presidents of independent institutions of higher learning located throughout the country. The Association's major purposes are to promote and improve the interests of independent American colleges and universities. The schools presided over by several of these member presidents, including the appellee, National College of Business, are directly affected by the rules at issue in this case. The

Solicitor General and counsel for the National College of Business have given written consent to the Association to file a brief as amicus curiae. Copies of these written consents have been filed with the Clerk.

QUESTIONS PRESENTED

1. Whether on the facts of the record in this case there is a linkage sufficient to satisfy the rational basis standard between the 85-15 and two-year requirements, and the statutory objective that veterans' educational benefit funds be spent on educational programs of acceptable quality.

2. Assuming that the first question can be answered in the affirmative, whether the irrebuttable presumptions that the 85-15 and the two-year rules represent fall outside the exception stated by *Weinberger v. Salfi* to the doctrine that irrebuttable presumptions are disfavored.

SUMMARY OF ARGUMENT

The judgment of the District Court should be affirmed. This can and should be accomplished without reaching the question whether a standard other than rational basis governs the case.

The Government's evidence on the record in this case fails to satisfy the rational basis standard for two reasons. First, there is no evidence on the record to support any positive relationship between the statutory objective and the discriminatory means selected to achieve it. The uncontradicted evidence is that the effect of both of these rules is to detract from, rather than to enhance, the quality of educational programs. Second, even if there were some evidence to support the Government's position on this crucial issue, the rational basis test would still not be satisfied because of the peculiar facts and circumstances of this case, particularly the availability of alternatives that would effectively achieve the statutory objective without infringing on important constitutional rights.

If the Court should decide that the rational basis test applies and that it is satisfied, the Court would then have to decide whether the irrebuttable presumptions which the 85-15 and two-year rules constitute fall within the exception category stated by *Weinberger v. Salfi*, 422 U.S. 749 (1975). It is our position that they do not, because of significant differences between veterans' education benefits and social security benefits.

ARGUMENT

I.

The 85-15 and Two-Year Rules Fail to Satisfy the Rational Basis Test

Rational basis, compelling state interest, or any standard in between, represents an attempt to express the extent to which the Government may trench upon the interests of its citizens without the protections of the Constitution coming into play. There is of course no quantitatively identifiable point at which citizen interests will be protected. The conflicting interests on both sides—those of the Government and those of the individual—must be taken into account. Rational basis simply expresses the generality that in some kinds of cases the balance scales will be weighted in favor of the Government. Conversely, compelling state interest, in those cases where it applies, weights the scales in favor of the individual.

Obviously, rational basis and compelling state interest are not the only possible tests for expressing the constitutionally permissible limits on governmental intrusion into constitutionally protected areas. There are conceptual intermediates, and the opinions of this Court have implied their recognition. *Trimble v. Gordon*, 430 U.S. 762 (1977); *Craig v. Boren*, 429 U.S. 190 (1976). It is equally obvious that regardless of whether there are intermediates, the rational basis and compelling state interest tests as articulated are sufficiently flexible to permit significant case-to-case variation in the constitutionally permissible extent to

which, under either standard, the Government may treat its citizens unequally.

The constitutional problem in this case concerns the weakness of the linkage (or indeed the very existence of any linkage) between a concededly proper governmental end and the means selected to achieve that end. No one will question the propriety of the governmental objective that—in the words of the District Court—"veterans enroll in quality courses if federal dollars are going to help support those courses." App.A, J.S., p. 22a.

The specific due process/equal protection question in this case, then, is whether there is a constitutionally acceptable linkage between the quality of a course and either the quantity of veterans who attend it, or the length of time it has been offered at the particular location.

The Government's solution is a simple one, involving a neat logical format: (1) this is a welfare benefits case to which the rational basis test applies; (2) the District Court determined that there is a rational basis; and (3) the relevant constitutional test is therefore satisfied.

This is probably not the most appropriate case for a definitive pronouncement concerning whether there is an intermediate standard between rational basis and compelling state interest. That issue need not be reached in this case. The Government's position, summarized above, suffers from two fundamental defects.

1. The first defect in the Government's position is its failure to recognize that without contradiction, the record evidence in this case establishes that the 85-15 and two-year rules have a negative, rather than a positive effect on the quality of the veterans educational experience. The testimony of two qualified professional educators that there is no positive relationship is

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1. See Transcript of Hearing (Tr) 178-179, 202, 255-256.

uncontradicted.[1] Moreover, each of the rules, for separate reasons, was shown to have a deteriorating effect on program quality, and that evidence is also uncontradicted.[2]

The Government's witness spoke of two abuses that had arisen, recruiting programs aimed especially at veterans, and the establishment of branches apart from the main campus as a means of attracting veterans.[3] This was the Government's only evidence on this crucial issue of the relationship between the statutory objective and the two rules at issue. It fails to satisfy the rational basis standard. The only "abuses" toward which the Government's evidence was directed were veteran recruiting and the establishment of branch campuses. These are not the "evils" at which this legislation was—or constitutionally could have been—aimed. Indeed, they are not evils at all, unless there is some evidence linking them not only to the 85-15 and two-year rules, but also to the quality of veteran education programs. There is no such evidence. The only evidence on the controlling issue in the case—whether there is a positive relationship between the 85-15 and two-year rules and the quality of veteran education programs—is that these rules are more likely to interdict the quality veterans' education programs than the bogus ones.

Neither is it sufficient to contend that Congress may assume a relationship between the statutory objective and the discriminatory means intended to achieve it. Such an assumption may enable the statute to survive a facial attack, but in this case there

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2. The average veteran student at the National College of Business is 37½ years old, has 2.2 children and works full time. Tr. 138. Because of the veterans' distinctive circumstances, they do not feel comfortable in a learning setting where they are in competition with younger people who have not been away from school for so long. Tr. 39-40, 139. The learning environment is therefore better for veterans when they can go to school with other veterans. Tr. 39-40, 185. With regard to the tie between the two-year rule and the quality of the educational program, the only evidence is that "a new program is probably going to be better than an old program because it has recently been reviewed . . . whereas some of the older programs . . . may be . . . still offered simply because no one has bothered to take a look at them." Tr. 176.

3. Tr. 275-277.

has been a trial, with opportunity to both sides to present evidence on the record that they considered relevant. Before this Court any general assumption favoring Congress must yield to the actual evidence on the record.

The Government asserts that "these statutory provisions simply channel the veterans' educational efforts toward courses that are likely to be more worthwhile. . . ." J.S. p. 9. That assertion is crucial to the Government's case. The problem with it is that it is squarely inconsistent with the record. There is no evidence that the 85-15 rule channels veteran efforts toward worthwhile courses. The only effect of that rule is to channel veterans away from other veterans. Yet the sole evidence is that veterans learn best when they go to school with other veterans.[4] Similarly the two-year rule does not channel veterans toward worthwhile courses. It channels them toward old courses, and the uncontradicted evidence is that to the extent the age of a course is relevant, it is the newer courses that are more likely to be worthwhile, because they have more recently had to stand the test of curricular review.[5]

2. The second deficiency in the Government's position is its narrow view of the extent of the constitutional protection afforded by the rational basis standard. Molding this case to fit the sterile logical forms to which the Government would subject it, depends on the premise that under all circumstances rational basis will permit any hypothetically conceivable relationship between the legislative end and the means selected to achieve it, no matter how tenuous the relationship is in fact, no matter how important the interests infringed upon or the certainty of the infringement, and no matter what alternatives are available. Indeed, the reason that the Government was able to enlist the District Court's opinion in support of its near syllogism is that the District Court also takes a narrow view of the protections

4. Tr. 39-40, 139, 185.
5. Tr. 176.

afforded by the rational basis standard: "almost anything can pass the most minimal level of scrutiny which is allowable within the concept of rational relationship." App. A, J.S., p. 22a.

Rational basis is not a monolith that always upholds Government's infringements on the rights of its citizens. By definition, its anchorage to reasonableness implies that all of the circumstances of the particular case will be taken into account. This means, at a minimum, that consideration must be given to the availability and superiority of alternatives.[6]

In this case there are alternatives. Unlike the 85-15 and two-year rules, these alternatives (1) are effective in separating quality from non-quality programs, and (2) do not trench upon constitutional rights. A pervasive feature of education beyond high school in this country is the maintenance of quality through accreditation. Like any other human undertaking, the accreditation of higher education institutions and programs has imperfections, but it represents our system's best efforts to evaluate an entire program and reach a net conclusion concerning quality. The record in this case shows that the Government itself—including the Veterans Administration—recognizes the accreditation process and relies on its results for some purposes.[7] Thus, if the ultimate end is to spend veterans' educational dollars only on educational programs of acceptable quality, the means for achieving that salutary end are available. There might have to be some adaptation of existing accreditation procedures, but if so, that is a small enough price to avoid the serious intrusions on constitutionally protected interests that otherwise result.

The worst vice of the 85-15 and two-year rules is that they are cruelly over-inclusive. Even assuming—contrary to the only evidence on this record—that these rules provided some indicia

6. See *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951). Cf. *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 31 (1977); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 95 (1977).
7. Tr. 107, 212, 293-295.

of program deficiencies, serious constitutional questions would remain because of the vast range of high quality programs necessarily caught in their undiscriminating nets. The record amply demonstrates, for example, that the appellee National College of Business offers a sound, high quality educational program. Notwithstanding the quality of its program, and notwithstanding the fact that quality is the statutory objective, veteran students attending the National College of Business, and many other schools like it, are deprived of the statutory benefits. There is no evidence on this record that courses offered by the National College of Business and similar schools do not make a material contribution to the veterans' education, and through them, to the national welfare.[8] The only evidence is that they do. There is no evidence that courses having more than 85% veterans enrolled or that have been offered less than two years are any lesser in quality. The only evidence is squarely contrary.

II.

The 85-15 and Two-Year Rules Are Unconstitutional Irrebuttable Presumptions

If the Court should conclude that the requirements of due process/equal protection were satisfied in this case, the Court would then have to deal with the due process/irrebuttable presumption issue. Both the 85-15 and also the two-year rule are clearly irrebuttable presumptions. As such, they fall in a category that has "long been disfavored"[9] under the due process clause. Both rules presume that any course that has more than 85% veterans enrolled or that has not been offered for two years at that location does not yield sufficiently worthwhile educational benefits to justify the expenditure of veterans' educational benefit funds. There is no opportunity to rebut that presumption in the individual case, even though it is obvious that there are many

8. It has been estimated that money spent for veterans' education purposes yields a return in increased taxes of three to six times the amount invested. Tr. 186.

9. *Vlandis v. Kline*, 412 U.S. 441, 446 (1973).

high quality courses that are new or that have high veteran enrollment. Indeed, the uncontroverted evidence on this record is that high veteran enrollment or newness of course provides no basis for presuming inferiority of the course.

In our view, the applicability of the irrebuttable presumption doctrine would not be foreclosed by this Court's holding in *Weinberger v. Salfi*, 422 U.S. 749 (1975) that "a noncontractual claim to receive funds from the public treasury enjoys no constitutionally protected status. . . ." 422 U.S. at 772. Whether technically "contractual" or not, the prospect of educational benefits is a major inducement used by military recruiters to attract military recruits.[10] These benefits are therefore different from the benefits in *Salfi*, and the rationale for excluding public benefit payments generally from the reach of due process protection against "procedure by presumption"[11] is inapplicable.

This court has never decided whether the *Salfi* exception applies to veterans' educational benefits. It will be called upon to do so in this case if it rejects the appellees' due process/equal protection claims.

The recent amendments to the statute do not diminish its constitutional defects. Limiting the 85-15 rule to those programs that enroll 35% or more veterans may lessen the number of programs affected by the statute's arbitrariness, but the arbitrariness itself is left untouched. The fatal, and erroneous, assumption of an inverse relationship between quantity of veterans and quality of program is still present.

The change in the two-year rule is especially significant. The Administrator is now given the discretion to waive this requirement.[12] On what basis will he waive? If he makes an effort to identify those courses offered less than two years whose

10. Tr. 17.

11. *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

12. Even before the amendment he had the discretion to waive the 85-15 rule. 38 U.S.C. (Supp. V) 1673(d), as amended by Pub. L. 94-502, Section 205, 90 Stat. 2387.

educational value makes them not worth spending veterans' dollars on them, he will be making the kind of inquiry that is relevant to the statutory objective and that will satisfy the demands of the Constitution. This is the kind of inquiry that he ought to be making anyway. If he exercises his waiver on some other basis, it will run the risk of being arbitrary, because of the lack of relationship to the statutory objective. But in either case, the quality of the course is unrelated to whether it has been offered for two years.

CONCLUSION

Gauged by either equal protection or irrebuttable presumption standards, this statute is defective. The objective of the statute is to channel veterans' educational benefit dollars into programs of acceptable quality. Yet the statutory means are unrelated to quality. By tying its objective to an irrelevant means, the statute has excluded from its benefits many undeniably worthwhile programs and their enrollees. Whether it has also excluded programs of little value has been left to chance.

The judgment of the lower court should be affirmed, so that the salutary objective of this statute can be pursued through constitutionally permissible means.

Respectfully submitted.

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